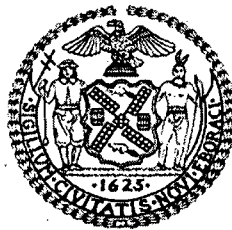


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THE CITY OF NEW YORK
OFFICE OF THE MAYOR

**Comments of the City of New York on the United States Environmental
Protection Agency's Proposal to Add Newtown Creek
in Brooklyn and Queens, New York to the National Priorities List
EPA-HQ-SFUND-2009-0588**

December 23, 2009

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Comments of the City of New York on the United States
Environmental Protection Agency's Proposal to
Add Newtown Creek to the National Priorities List

The City of New York ("City") submits these comments in response to the proposed rulemaking by the United States Environmental Protection Agency ("EPA") to add Newtown Creek ("Creek") in Brooklyn and Queens, New York to the National Priorities List ("NPL" or the "proposed Superfund listing").¹ According to the Hazard Ranking System ("HRS") documentation record for Newtown Creek, the proposed designation consists of contaminated Creek sediments ("Site").² The City fully supports an efficient, thorough and prompt cleanup of the Creek to a standard that is protective of human health and the environment.

The City has conducted a comprehensive analysis of EPA's proposal to add Newtown Creek to the NPL. While we have concerns about the potential for a listing to delay critical investments in infrastructure, housing, open space, and small businesses operations, the City believes that, in these circumstances, a listing could be the most effective way to remediate more than one hundred years of industrial contamination. If EPA chooses to add Newtown Creek to the NPL, it must ensure that vitally important City investments and plans are not delayed or deferred during the cleanup process. The City believes that EPA can address many potentially negative impacts by committing the appropriate resources and working collaboratively with the City and impacted communities. By treating the City as a full intergovernmental partner in this effort, and taking advantage of the City's knowledge and expertise, EPA can prevent duplication and wasted efforts in what will certainly be a complicated process.

During the comment period, the City has assessed potential impacts of a listing on the NPL on the ongoing and planned water quality and capital improvement projects and City initiatives in and around Newtown Creek. Because the Creek runs through dense, active, mixed-use urban areas of Brooklyn and Queens, the listing has the potential to directly impact the approximately 300,000 residents within a one mile radius of the Creek.³ Pursuant to the New York State Department of Environmental Conservation ("NYS DEC") Combined Sewer Overflow Order, NYS DEC Case #002-20000107-8, the New York City Department of Environmental Protection ("NYC DEP") has planned approximately \$500 million of water quality improvement work in Newtown Creek, approximately \$380 million of which may be impacted by a listing on the NPL. In addition, two major City land use initiatives to increase open space, access to the waterfront, and affordable housing are located on the north and south sides of the mouth of the Creek. The Creek touches three of the City's 16 designated Industrial Business Zones ("IBZs"), Long Island City, Maspeth, and North Brooklyn – which are special

¹ National Priorities List, Proposed Rule, 74 Fed. Reg. 48511 (U.S. Env'tl. Prot. Agency, Sept. 23, 2009).

² U.S. ENVTL. PROT. AGENCY, HRS DOCUMENTATION RECORD, NEWTOWN CREEK 12 (Sept. 2009).

³ U.S. Census Bureau, 2000 Census Summary File 1, *available at* http://www2.census.gov/census_2000/datasets/Summary_File_1/ (last visited October 23, 2009), Table SF 1-00.

districts established to foster industrial businesses.⁴ The waterway itself is routinely used for local barge traffic to service businesses and other essential activities along the Creek.⁵

Taking into consideration the density and significance of ongoing activity in and around Newtown Creek, addition to the NPL at this location has the potential to affect more people than at almost any other Superfund sediment dredging site in the country.⁶ This fact informs the City's position that placement of Newtown Creek on the NPL must be accompanied by allocation of commensurate resources by EPA to investigate and remediate this waterbody properly and promptly. In addition, it is vitally important that the public and private projects and facilities near Newtown Creek continue to operate and progress during this process, which will require EPA to devote sufficient regional staff resources to be responsive to the needs of the municipality and the community, including local businesses. Of particular importance will be EPA's attention to, and support of, the logistical demands of projects that are currently being undertaken by NYC DEP, the New York City Department of Housing Preservation and Development ("NYC HPD"), the New York City Department of City Planning ("NYC DCP"), the New York City Department of Parks and Recreation ("NYC DPR") and other City and State agencies.

The City seeks a commitment from EPA that sufficient Federal resources will be devoted to ensure that projects and initiatives proximal to the Creek proceed without undue delays, deterrence, or additional restrictions arising from the proposal to the NPL. It should be noted that many of the projects and initiatives underway in and around Newtown Creek are designed to bring long-desired services and amenities to the Creek's waterfront and adjacent neighborhoods and have the strong support of local communities and elected officials. Collectively, ongoing and planned City projects will help redevelop vacant and underused waterfront parcels along the Creek, create recreational access to Newtown Creek and the East River, provide much needed housing, including affordable housing, create active and passive public open space along the waterfront, provide significant water quality and infrastructure improvements, and foster a supportive environment for business and industry along the approximately ten linear miles of Newtown Creek waterfront. The City seeks assurances from EPA that, in the context of a listing on the NPL, every effort will be made to keep activity in and around Newtown Creek on schedule.

Regarding the extensive industrial history of the Creek, the City expects EPA to conduct comprehensive Remedial Investigation and Responsible Party searches to identify current and

⁴ N.Y. City Mayor's Ofc., "New York City Industrial Policy Protecting and Growing New York City's Industrial Job Base," available at <http://nyc.gov/html/imb/downloads/pdf/whitepaper.pdf> (Jan. 2005), 15-17.

⁵ U.S. Army Corps of Eng'rs, *U.S. Waterway Data: Port and Waterway Facilities*, available at <http://www.ndc.iwr.usace.army.mil/data/datapwd.htm> and <http://www.iwr.usace.army.mil/ndc/db/ports/data/portsall.txt> (last visited Oct. 8, 2009).

⁶ Data collected and statistics calculated by the New York City Mayor's Office of Environmental Remediation from Env'tl. Prot. Agency site progress profiles and the Comprehensive Environmental Response, Compensation, and Liability Info. Serv. ("EPA CERCLIS") database (last visited Oct. 2009), available at <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm>.

historical industrial operators responsible for all significant sources of contamination to the Creek. In his letter recommending Newtown Creek for NPL consideration, attached as Appendix A, New York State Department of Environmental Conservation Commissioner Alexander Crannis "strongly suggested" that a work plan submitted by a group of five Responsible Parties, known as the Newtown Creek Group, "be considered in any future actions USEPA may have for the creek."⁷ The City requested and received from EPA this document, the Creekwide Remedial Investigation/Feasibility Study prepared by the Newtown Creek Group ("Work Plan"), for review during the comment period. The City's assessment of the Work Plan, which is attached as Appendix B, concludes that it fails to provide a sufficient Remedial Investigation scope to support a Feasibility Study or produce a remedy that would be protective of human health and the environment.

The City urges EPA to pursue an intergovernmental collaboration with City, State, and other Federal governmental agencies to maximize existing and available resources to achieve the shared goals of remediating Newtown Creek to a standard that protects public health and the environment while maintaining the integrity of ongoing and planned work in and around the Creek. Intergovernmental collaboration and communication will ensure that all City, State, and Federal priorities, for which the communities around Newtown Creek have high expectations, will be addressed properly and efficiently. It will also achieve EPA's agency-wide goal of working in partnership with local communities and governments.⁸ EPA's own Community Engagement Initiative emphasizes that to succeed, such engagement "must be coupled with solid and well thought out inter-[governmental] agency collaboration."⁹

Finally, in the event that EPA adds Newtown Creek to the NPL, the City requests that EPA implement all activities associated with the Superfund process, including but not limited to the Remedial Investigation, Feasibility Study, Record of Decision, Remedial Design and Remedial Action in an expedited manner to prevent the unnecessary delays often associated with large and complex Superfund projects. EPA should establish and maintain a timetable for the

⁷ Letter from Alexander B. Gramis, Comm'r, N.Y. State Dep't of Env'd. Cons. to Alan Steinberg, Regional Adm'r, U. S. Env'tl. Prot. Agency, Re: Docket No. EPA-HQ-SFUND-2009-0588-004 (Jan. 20, 2009).

⁸ See, e.g., Lisa P. Jackson, Adm'r, U.S. Env'tl. Prot. Agency, Remarks to the Local Government Advisory Committee, As Prepared (Mar. 24, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/Speeches%20-%20By%20Date?OpenView> (follow hyperlink for "3/24/2009 Administrator Lisa P. Jackson Remarks to the Local Government Advisory Committee As Prepared") (characterizing EPA-local government collaboration as "vital"); U.S. Env'tl. Prot. Agency, *Brownfields 2009: Sustainable Communities Start Here* (New Orleans, 2009) (specifically Melissa Friedland, "Moving beyond CERCLA: How U.S. EPA and Local Governments Work Together to Reuse Superfund Sites" at 79; John Frece, "What do Transportation, Affordable Housing, and Revitalization Have in Common?" at 48; Carlos Pachon, "Overcoming the Barriers and Impediments to Green Remediation," at 44; Megan Quim, "EPA's Targeted Brownfields Assessment (TBA) Program" at 47; Kent Benjamin, "Planning for Environmental Justice," at 43; Philip Vorsatz, "Petroleum Brownfield Corridors: Tamiami and Historic Civil Rights Trails," at 65).

⁹ U.S. EPA, Community Engagement Initiative Proposed Action Plan (last visited Dec. 14, 2009), available at www.epa.gov/oswer/engagementinitiative.htm (follow hyperlink for OSWER Community Engagement Initiative) 2.

completion of all milestone activities and the submission of all milestone documents expected throughout the remedial program.

These public comments will describe current infrastructure, economic activity, and planned projects in and around the Creek, identify the associated issues of concern and detail the assurances that the City seeks from EPA so that if Newtown Creek is listed on the NPL, the remedial program will proceed promptly and efficiently with the least possible negative impact on the surrounding neighborhoods and planned projects.

The comments that follow are organized into four sections:

- I. A Brief History of Newtown Creek
- II. EPA's Hazard Ranking System Score for Newtown Creek and Scope of Creekwide Investigation
- III. Projects and Initiatives Potentially Impacted by a Superfund Designation
- IV. Commitments the City Seeks from EPA

Successful realization of the City's plans in and around Newtown Creek will require the direct involvement of EPA in activities including: remediation and reuse of Brownfields within the watershed, construction along the shoreline and in the Creek, dredging and/or disturbance of Creek sediment, creation of public access to and appropriate direct contact with the Creek water, and maintenance of commercial and industrial activities along the Creek. The City urges EPA to assure the community and the City that a listing on the NPL not only will facilitate prompt and effective remediation of contaminated Creek sediment, but in doing so will not delay, impair, or otherwise impede improvements and services expected by the surrounding communities.

I. A Brief History of Newtown Creek

Newtown Creek is a 3.8-mile long body of water that winds westward from its point of origin at the intersection of 47th Street and Crand Avenue on the Brooklyn-Queens border to its connection with the East River opposite 26th Street in Manhattan. It has five tributaries: Dutch Kills, Maspeth Creek, Whale Creek, East Branch, and English Kills. The Creek serves as part of the border between Brooklyn and Queens as it meanders through the neighborhoods of Greenpoint, Williamsburg, Bushwick, Long Island City, and Maspeth. The area surrounding the Creek is largely zoned for industrial use with the exception of certain sections around the mouth of the Creek.¹⁰

Before European settlement in the New York Harbor area, Newtown Creek was a shallow stream with numerous side channels and tidal marshes.¹¹ Its natural depth ranged from 12.5 feet at the mouth to six feet in English Kills.¹² In 1638, Dutch Governor Willem Kieft purchased much of the land along the Creek from the Maspetches Indian tribe.¹³ This land was used for farming and agriculture until industrial development began in the mid-nineteenth century.¹⁴

During the period of European settlement, two towns formed on either side of the Creek: Bushwick to the south and Newtown to the north. When the British Crown issued official charters to both municipalities, it did not grant title to land beneath the waters of Newtown Creek. As a result, following American independence from Great Britain, title to that property devolved from the Crown to the State of New York. Today, the majority of the creek-bed is owned by the State of New York, although small portions are owned by the Federal government, the City, and private individuals.¹⁵ A summary of the Creek's ownership is attached as Appendix C.

¹⁰ N.Y. City Dep't of City Planning, Zoning Map §§ 8d, 9b, 12c, 13a, 13c, available at <http://www.nyc.gov/html/dcp/html/zone/zonedex.shtml> (2009); see also Lindsay K. Campbell, *New York City's Forgotten Industrial Waterway: Assessment, Goals, and Indicators for Long-Term Sustainability of the Newtown Creek*, presented at the United Nations 15th Comm'n on Sustainable Dev't (May 2, 2007), 3, 18.

¹¹ Anchor Environmental, L.L.C., *Draft Remedial Investigation Report, Operable Unit 6, Laurel Hill Site, Maspeth, New York*, prepared for Phelps Dodge Ref. Corp. (May 2007), 12.

¹² U.S. War Dep't., ANNUAL REPORT OF THE CHIEF ENGINEERS, UNITED STATES ARMY, TO THE SECRETARY OF WAR, FOR THE YEAR 1884 at 765.

¹³ E.E. Lippincott, *NEWTOWN CREEK; Sounding a Death Knell for a Long-Forsaken Waterway*, N.Y. TIMES, Feb. 10, 2002.

¹⁴ Anchor Environmental, L.L.C. *Draft Remedial Investigation Report, Operable Unit 6, Laurel Hill Site, Maspeth, New York*, prepared for Phelps Dodge Ref. Corp. (May 2007), 12.

¹⁵ See Memorandum from Lisa Bova-Hiatt, Deputy Chief, Tax & Bankruptcy Litig. Div., N.Y. City Law Dep't., to Cas Holloway and Johanna Greenbaum, Ofc. of N.Y. City Deputy Mayor for Operations, *Ownership of Newtown Creek* (Oct. 20, 2009).

A. Industrial History

Rapid industrial growth around Newtown Creek began in 1854, with the founding of the New York Kerosene Company.¹⁶ Soon Newtown Creek was home to glue factories, smelting plants, fat-rendering plants, kerosene refineries, chemical production plants, sugar refineries, brick production facilities, lumber yards, and coal yards, all of which disposed of industrial waste directly into the Creek's waters.¹⁷ During these years, many sewers were constructed prior to the boroughs of Brooklyn and Queens being consolidated into New York City, which occurred in 1898. At the time, these combined sewers were "considered state-of-the-art pollution control."¹⁸ Brooklyn's sewer system had over 500 miles of sewer lines by 1895,¹⁹ and by 1910, there were sewer lines in the towns of Long Island City, Flushing, College Point, and Whitestone.²⁰ The sewer construction, here and in many cities throughout the country, was a direct response to the public health threat posed by epidemic diseases, largely attributed to land-based sewage disposal.²¹

The first oil refineries along the Creek began operations in 1866. Many did not have systems to prevent spillage, which would result in direct discharge or seep into Newtown Creek.²² Oil refining along Newtown Creek grew rapidly, with over 50 refineries operating along its banks by 1870. By the end of the 19th century, the salt marshes along the Creek were filled by wastes and other industrial discharges.²³ The impact of manufacturing and refining waste was documented in a 1894 New York State Department of Health report, which cited the discharge of refuse products from oil works as a major contributor to the public health nuisance.²⁴

¹⁶ Anchor Environmental, L.L.C. *Draft Remedial Investigation Report, Operable Unit 6, Laurel Hill Site, Maspeth, New York*, prepared for Phelps Dodge Ref. Corp. (May 2007), 12.

¹⁷ Lindsay K. Campbell, *New York City's Forgotten Industrial Waterway: Assessment, Goals, and Indicators for Long-Term Sustainability of the Newtown Creek*, presented at the United Nations 15th Comm'n on Sustainable Development (May 2, 2007), 12.

¹⁸ James P. Heaney et al., *Collection Systems, Chapter Six*, in JAMES P. HEANEY ET AL., *INNOVATIVE URBAN WET-WEATHER FLOW MANAGEMENT SYSTEMS*, available at <http://www.epa.gov/nrmrl/pubs/600r99029/600R99029prelim.pdf> (1999) 3.

¹⁹ *BROOKLYN WATER SUPPLY; Commissioner White Completes His Annual Report; Increase in Consumption over 1894; Despite Light Rainfall; There Has Been Abundance for All Requirements -- Improved Financial Showing*, N.Y. TIMES, Dec. 14, 1895, at 10.

²⁰ *CIVIC NEEDS OF NEW YORK'S BIGGEST BOROUGH; You Could Put Three Bostons in Queens, or One Boston and a Brooklyn, or Most of Philadelphia*, N.Y. TIMES, Sept. 4, 1910, at A9.

²¹ Sam Solomon, *Sanitation named modern medicine's greatest milestone*, NAT'L REV. OF MEDICINE (Feb. 15, 2007).

²² Katherine Hill, *Greenpoint Oil Spill*, in *ENCYCLOPEDIA OF EARTH*, available at http://www.eoearth.org/article/Greenpoint_Oil_Spill (Cutler J. Cleveland ed., last updated Dec. 14, 2009).

²³ U.S. Env'tl. Prot. Agency, *Newtown Creek/Greenpoint Oil Spill Study, Brooklyn, New York* (Sept. 12, 2007) 2.

²⁴ *THE NUISANCES MUST GO; Gov. Flower says that Newtown Creek Must Be Purified; FIVE FACTORIES*

In 1896, Congress passed the Rivers and Harbors Act,²⁵ which mandated the widening and deepening of the Creek. Eventually the United States Army Corps of Engineers ("Corps")²⁶ established a 125-foot-wide, 18-foot-deep navigation channel that provided larger boats and barges with access to the many manufacturing operations lining both sides of the Creek.²⁷ This spurred further growth of Newtown Creek as a major thoroughfare. In 1926 Newtown Creek carried one-third as much tonnage as the entire Mississippi River.²⁸ In the first three decades of the 20th century, the Federal Government spent over \$1 million in improvements to Newtown Creek to aid commerce,²⁹ and additional dredging projects within portion of the Creek were performed by the Corps 30 times from 1929 to 1974 to maintain it as a navigation channel. Dredging depths ranged between 15 feet and 23 feet.³⁰ As industry and transportation changed, the Creek still remained a major industrial waterway through the mid-20th Century. In the 1950s oil was still one of the dominant commodities being transported on the Creek.³¹

There are five companies, identified in a 2007 notice of intent to sue sent by New York State Attorney General Andrew Cuomo, whose corporate genealogies connect them to many of Newtown Creek's heaviest industrial polluters of the 19th and early 20th centuries: ExxonMobil, BP (formerly known as British Petroleum), Chevron, Phelps Dodge, and National Grid.³² In his letter to them, which is attached as Appendix D, Attorney General Cuomo noted that these companies "creat(ed) an imminent and substantial endangerment to health and the environment

ORDERED CLOSED; Private Business Not to Be Allowed to Jeopardize the Health of Brooklyn and Long Island City; N.Y. TIMES, Dec. 12, 1894, at 16 (summarizing report by the New York State Board of Health's Committee on Offensive Trades and Effluvium Nuisances).

²⁵ Rivers and Harbors Appropriation Act, 33 U.S.C. §§ 401-416 (1899).

²⁶ S. REP. NO. 1020, at 55 (1917).

²⁷ Anchor Environmental, L.L.C., *Draft Remedial Investigation Report, Operable Unit 6, Laurel Hill Site, Maspeth, New York*, prepared for Phelps Dodge Ref. Corp. (May 2007), 13.

²⁸ F.D. McMullen, *Up turbid and congested Newtown Creek*, N.Y. TIMES, Feb. 3, 1929.

²⁹ *Praises Development of Newtown Creek; Port Authority Calls \$1,048,653 Federal Outlays for It in Thirty Years Good Investment*, N.Y. TIMES, May 22, 1932, at N6.

³⁰ E-mail with attachments from Joseph Olha, Army Corps of Eng'rs, to Holly Hester-Reilly, Project Manager, N.Y. City Ofc. of Env'tl. Remediation ("OER") (*Corps Dredging Records*, Oct. 27, 2009), copy on file with OER.

³¹ K. P. Shepard, *Ugly ducklings ply backwaters*, N.Y. TIMES, Nov 6, 1952.

³² ExxonMobil's predecessor companies include Standard Oil Company, Standard Oil Trust, and the Mobil Oil Corporation. Phelps Dodge's predecessor companies include Laurel Hill Chemical Works and the Nichols Copper Company. Chevron's predecessor companies include Paragon Oil Company and Texaco Inc. National Grid's predecessor companies include the Brooklyn Union Gas Company and KeySpan, while Amoco is one of BP's predecessor companies. See, e.g., Eric V. Thompson, Petroleum Archives Project, Univ. of Va., *A Brief History of Major Oil Companies in the Gulf Region*, <http://www.virginia.edu/igpr/APAG/apagoilhistory.html> (last visited Dec. 5, 2009); ALFRED DUPONT CHANDLER, *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* (1990), 125; *Brooklyn Union to Become a KeySpan Company*, BUSINESS WIRE (Sept. 29, 1997), available at <http://www.highbeam.com/doc/1G1-19792561.html>; National Grid, *National Grid to Acquire KeySpan in \$7.3 Billion Cash Transaction*, available at http://www.nationalgridus.com/aboutus/a3-1_news2.asp?document=1371 (Feb. 27, 2006).

in Newtown Creek and portions of the adjacent shoreline.”³³ ExxonMobil, BP, and Chevron all own or owned facilities that were used at one point for bulk oil storage and refining, while Phelps Dodge and National Grid own or owned facilities that processed copper and produced manufactured gas, respectively.³⁴

Standard Oil, a predecessor to ExxonMobil, began operations along the Creek in 1866.³⁵ Since the early 1900s, the Standard Oil Company³⁶ stored petroleum on its properties in addition to its ongoing refining processes. These sites were located at the Brooklyn Tetminal in Greenpoint, Brooklyn.³⁷ In the 1950s, an explosion at the Brooklyn Terminal site resulted in a slow leakage of petroleum from storage tanks into the ground.³⁸ This spill went undetected until 1978 when the Coast Guard observed a large oil slick on the surface of Newtown Creek. An investigation revealed a 17-to-30 million gallon oil spill, the largest ever recorded in North America, underneath the neighborhood of Greenpoint, Brooklyn.³⁹

In 1990, Mobil signed a consent decree with New York State, mandating the cleanup of the oil spill.⁴⁰ Since then, ExxonMobil has used dual pump recovery wells to capture around 9.3 million gallons of petroleum product.⁴¹ Despite this initial progress, the consent decree is limited in its effectiveness. The agreement between the State and ExxonMobil only covers the remediation of soils in and around the immediate spill area; it does not require the remediation of actual Creek waters and sediments, both of which were affected by the spill.⁴² ExxonMobil’s limited source collection efforts have not addressed the fundamental problem – long dormant pollutants lining the bottom of the Creek. For instance, recent remedial investigations of Newtown Creek have shown sediment concentrations of total petroleum hydrocarbons to exceed 10% of sample weight by mass.⁴³

³³ See Appendix D.

³⁴ See *id.*, 3-6.

³⁵ Anchor Environmental, L.L.C., *Draft Remedial Investigation Report, Operable Unit 6, Laurel Hill Site, Maspeth, New York*, prepared for Phelps Dodge Ref. Corp. (May 2007), 14.

³⁶ In 1911, the Standard Oil Trust dissolved and the Standard Oil Company assumed sole ownership. The Standard Oil Company of New York later became Mobil Oil Corporation, which finally became today’s ExxonMobil Corporation. Refining operations at the Brooklyn Terminal ceased in 1966 and the site was converted into a storage facility for large quantities of petroleum until 1993. See U.S. Env’tl. Prot. Agency, *Newtown Creek/Greenpoint Oil Spill Study, Brooklyn, New York* (Sept. 12, 2007), 2-3.

³⁷ See Appendix D.

³⁸ Nicholas Confessore, *New York Moves Toward Suit Over a 50-Year-Old Oil Spill*, N.Y. TIMES, Feb. 9, 2007.

³⁹ U.S. Env’tl. Prot. Agency, *Newtown Creek/Greenpoint Oil Spill Study, Brooklyn, New York* (Sept. 12, 2007) 2-3.

⁴⁰ Thomas J. Lueck, *Congress Members Seek Action on Newtown Creek*, N.Y. TIMES, Oct. 17, 2006.

⁴¹ N.Y. State Dep’t of Env’tl. Cons. and N.Y. State Dep’t of Health, *Fact Sheet: Project Update, Greenpoint Petroleum Remediation Project 2* (Sept. 2007).

⁴² Nicholas Confessore, *New York Moves Toward Suit Over a 50-Year-Old Oil Spill*, N.Y. TIMES, Feb. 9, 2007.

⁴³ Anchor Environmental, L.L.C., *Draft Remedial Investigation Report, Operable Unit 6, Laurel Hill Site, Maspeth, New York*, prepared for Phelps Dodge Ref. Corp. (May 2007).

Ohevron currently owns a petroleum storage facility in Creenpoint, Brooklyn. Both Chevron and its predecessor companies have disposed of petroleum waste products into the soil adjacent to the Creek. BP owns the BP Amoco Bulk Storage Facility in Creenpoint, Brooklyn. It too, has discharged and spilled petroleum and petroleum-based waste products into the surrounding soil and groundwater.⁴⁴

In 1866, Laurel Hill Chemical Works, a predecessor to Phelps Dodge, was founded in Laurel Hill, Queens. The company produced sulfuric, muriatic, and nitric acid as well as refined copper at its facility on the northern banks of Newtown Creek. There have been numerous hazardous waste disposals at Laurel Hill, including large vats of sulfuric acid dumped directly into the waters of Newtown Creek.⁴⁵ Phelps Dodge, like many other companies on the Creek, used its waste product to fill in marshland areas on its property. Hot slag, a byproduct of the copper smelting process at Laurel Hill, was used to fill the swampy shores of the Creek and create a stable foundation for future development. In the late 1890s, 130 tons of slag were removed from Laurel Hill every day to be used as fill for the surrounding wetlands.⁴⁶

In 1983, after 113 years of continuous operation, Phelps Dodge ceased all industrial production on the property. In 1986, the company sold the Laurel Hill property to the United States Postal Service ("USPS") for \$14.7 million. After the extent of the environmental damage to the site was revealed, the U.S. Attorney's Office successfully sued Phelps Dodge on behalf of the USPS for failing to cleanup numerous environmental hazards accumulated through years of on-site waste disposal. Judge John Cleeson ordered a rescission of the purchase contract and Phelps Dodge reacquired the Laurel Hill property.⁴⁷

In 1987, NYS DEC developed a remediation plan for the former copper smelting facility. Testing of soil and groundwater on the property revealed high concentrations of heavy metals and PCBs.⁴⁸ In response to these tests, Phelps Dodge first razed all buildings on the Laurel Hill site. From 2003 to 2004, Phelps Dodge removed and disposed of 10 tons of mercury contaminated soil and debris, 16,104 tons of hazardous soil, and 20 gallons of mercury contaminated liquids.⁴⁹ As with ExxonMobil's remediation project, cleanup activities were limited to company property. There was no remediation of Creek sediments.⁵⁰ Subsequent Remedial Investigations performed under the authority of NYS DEC by Phelps Dodge in Newtown Creek in 2004 and 2005 showed copper concentrations in sediment along the Phelps

⁴⁴ See Appendix D.

⁴⁵ Curtis Cravens, *COPPER ON THE CREEK: RECLAIMING AN INDUSTRIAL HISTORY* (2000), 11.

⁴⁶ *Id.*, 17.

⁴⁷ *Id.*, 6.

⁴⁸ This term refers to polychlorinated biphenyls, a type of toxic chemicals used in many industrial processes.

⁴⁹ Anchor Environmental, L.L.C., *Draft Remedial Investigation Report, Operable Unit 6, Laurel Hill Site, Maspeth, New York*, prepared for Phelps Dodge Ref. Corp. (May 2007), 14.

⁵⁰ *Id.*, 16-18.

Dodge bulkhead-line as high as 30,300 parts per million (3%).⁵¹

The Brooklyn Union Gas Company, a predecessor to National Grid and KeySpan, built a manufactured gas facility along the Newtown Creek shoreline in 1927. Two years later the company was shipping 400,000 tons of byproduct each year while storing coal-gasification waste tars on site. The Brooklyn Union Gas Company operated three manufactured gas plant facilities ("MGPs") along Newtown Creek: the Greenpoint Energy Center, the Equity Works MPG site, and the Scholes Street Holder Station.⁵² Today, National Grid still operates a liquefied natural gas plant at the Greenpoint Energy Center.⁵³ From 2004 to 2005, KeySpan (now National Grid) completed an Interim Remedial Measure ("IRM") in partnership with NYS DEG at the northeast corner of the Greenpoint Energy Center. The site was known to contain an underground coal tar plume, arsenic, metals, PCBs, petroleum products, VOCs, and SVOCs.⁵⁴ Under the IRM, 9,900 tons of hazardous soils were removed from the site.⁵⁵

B. Modern History

In 1967, the City built a new sewage treatment plant at Newtown Creek which significantly improved water quality by treating up to 310 million gallons ("MG") of wastewater per day.⁵⁶ In 1998, the NYC DEP began upgrading the Newtown Creek Waste Water Treatment Plant to comply with the Clean Water Act's ("CWA")⁵⁷ Secondary Treatment Standards and treat up to 700 million gallons of wastewater per day during wet weather.⁵⁸ As part of the upgrade, NYC DEP also constructed eight egg-shaped digesters, each of which can process up to 1.5 million gallons of wastewater sludge every day.⁵⁹ In 2007, NYC DEP opened the Waterfront

⁵¹ Anchor Environmental, L.L.C., *Draft Remedial Investigation Report, Operable Unit 6, Laurel Hill Site, Maspeth, New York*, prepared for Phelps Dodge Ref. Corp. (May 2007), Table I-1, Appendix I.

⁵² See Appendix D.

⁵³ Paulus, Sokolowski and Sartor Engineering, P.C. ("PS&SPC"), *Final Interim Remedial Measure (IRM) Completion Report for the Greenpoint Energy Center, Northeast Corner, Greenpoint, Brooklyn, New York, Site No. V006312*, prepared for KeySpan Corp. (June 2006), 6-7.

⁵⁴ These terms refer to volatile organic compounds and semi-volatile organic compounds.

⁵⁵ Paulus, Sokolowski and Sartor Engineering, P.C. ("PS&SPC"), *Final Interim Remedial Measure (IRM) Completion Report for the Greenpoint Energy Center, Northeast Corner, Greenpoint, Brooklyn, New York, Site No. V006312*, prepared for KeySpan Corp. (June 2006), 6-7.

⁵⁶ N.Y. CITY DEP'T OF ENVTL. PROT., DRAFT WATERBODY/WATERSHED FACILITY PLAN REPORT, CITY-WIDE LONG TERM CSO CONTROL PLANNING PROJECT, NEWTOWN CREEK (June 2007), 6; N.Y. City Dep't of Env'tl. Prot., DEP Celebrates Lighting of Newtown Creek 'Digester Eggs' Landmark, available at http://www.nyc.gov/html/dep/html/press_releases/08-14pr.shtml (June 3, 2008) 4-5.

⁵⁷ 33 U.S.C. §§ 1251-1387 (1972).

⁵⁸ N.Y. City Dep't of Env'tl. Prot. and Greeley and Hansen, L.L.C. et al., NEWTOWN CREEK WATER POLLUTION CONTROL PROJECT ENHANCED TRACK 3 FACILITY PLAN (Mar 2004).

⁵⁹ N.Y. City Dep't of Env'tl. Prot., DEP Celebrates Lighting of Newtown Creek 'Digester Eggs' Landmark,

Nature Walk at the Newtown Creek Plant, allowing public access to the Creek for the first time in decades.⁶⁰

Today, almost all of the land bordering Newtown Creek is zoned for heavy industrial use and lies within one of three City-designated Industrial Business Zones.⁶¹ Newtown Creek still hosts important commercial traffic, with over 1,000,000 tons of goods transported along the Creek during 2007 in over 2,500 vessel trips.⁶² Approximately 1,500 businesses are located within one quarter mile of the Creek⁶³ including a cement plant, a scrap yard, a beverage distributor, a construction supply company, a biodiesel fuel manufacturer and a recycling plant.⁶⁴

Two recent City rezoning projects seek to transform the area around the mouth of Newtown Creek. The Hunter's Point South redevelopment plan will build middle-income housing on 30 acres of Queens waterfront property along the East River on the north side of the Creek.⁶⁵ The Greenpoint-Williamsburg rezoning calls for the creation of over 50 acres of open space as well as 10,000 new housing units on or near waterfront property in northwest Brooklyn.⁶⁶ Both projects will increase public access to the waterfront and provide communities with much needed affordable housing and open space.

available at http://www.nyc.gov/html/dep/html/press_releases/08-14pr.shtml (June 3, 2008) 4-5.

⁶⁰ N.Y. City Dep't of Env'tl. Prot., DEP Celebrates Lighting of Newtown Creek 'Digester Eggs' Landmark, available at http://www.nyc.gov/html/dep/html/press_releases/08-14pr.shtml (June 3, 2008) 4-5.

⁶¹ N.Y. City Dep't of City Planning, *Zoning*, available at <http://www.nyc.gov/html/dcp/html/subcats/zoning.shtml> (last visited Oct. 30, 2009).

⁶² U.S. Army Corps of Eng'rs, *Waterborne Commerce of the United States: Part 1 – Atlantic Coast*, available at <http://www.iwr.usace.army.mil/ndc/wcsc/webpub/webpubpart-1.htm> (last visited Dec. 16, 2009).

⁶³ Statistics compiled by N.Y. State Dep't of Labor based on Quarterly Census of Employment and Wages, on file with N.Y. City Econ. Dev't Corp.

⁶⁴ Brian Zumhagen, *Biofuel Facility Coming to Newtown Creek in Greenpoint*, WNYC, available at <http://www.wnyc.org/news/articles/145391> (Dec. 2, 2009); Ray Rivera, *Biodiesel Makers See Opportunity as New York Seeks Greener Future*, N.Y. TIMES, May 28, 2007; Jim O'Grady, *NEW YORK WATERWAYS: Hike on Newtown Creek? It Isn't Quite That Awful*, N.Y. TIMES, Feb. 15, 2004.

⁶⁵ N.Y. City Econ. Dev't Corp., *Current Projects: Hunter's Point South*, available at <http://www.nycedc.com/ProjectsOpportunities/CurrentProjects/Queens/HuntersPointSouth/Pages/HuntersPointSouth.aspx> (last visited Dec. 5, 2009).

⁶⁶ N.Y. City Ofc. of the Mayor, *Mayor Michael R. Bloomberg Praises Passage of Greenpoint-Williamsburg Rezoning and Reiterates Administration's Commitment to Strengthening Industry*, Press Release 183-05 (May 11, 2005).

II. EPA's Hazard Ranking System Score for Newtown Creek and Scope of Creekwide Investigation

A. Hazard Ranking Score

The City recognizes the presence of contamination and fully supports an efficient, thorough and prompt cleanup of the Creek to a standard that is protective of human health and the environment. The City, however, has concerns about the methodology that EPA used to generate the HRS score. After careful review of the HRS Documentation Record prepared by EPA, dated September 2009,⁶⁷ the City prepared a technical analysis, critiquing components of the HRS score, which is attached as Appendix E. The analysis addresses EPA's classification of Newtown Creek as a "source" of contamination and notes that Creek sediments contain hazardous material resulting from both historical and ongoing inputs from numerous upland sources, several of which have been identified and are currently being investigated under NYS DEC consent orders.⁶⁸ The Creek should be considered the receptor or "sink" for contaminants discharged from adjacent industrial properties rather than the original source of these contaminants. The City urges EPA to thoroughly investigate the origin of all sources, both known and unknown, along the entire length of the Creek. The appended analysis⁶⁹ also addresses data presented in the HRS and other existing Newtown Creek data, which indicates that contaminants are not uniformly distributed throughout the sediment in the Creek. As such, further EPA investigation is necessary to identify the nature and extent of contamination throughout the length of the 3.8-mile waterway; to prevent a misrepresentation of the whole Creek as containing uniform amounts of hazardous materials; and to assist in identifying contributing upland sources.

⁶⁷ U.S. ENVTL. PROT. AGENCY, HRS DOCUMENTATION RECORD, NEWTOWN CREEK (Sept. 2009).

⁶⁸ A February 8, 2007 letter from Andrew Cuomo, New York State Attorney General, and Robert Emmet Heman, Assistant Attorney General, gave notice of the state's intent to sue ExxonMobil Corporation, Chevron Corporation, BP America, Inc., Phelps Dodge Corporation, and Keyspan Corporation, and several of their corporate affiliates, for one or more violations in Newtown Creek of the federal Resource Conservation and Recovery Act at 42 U.S.C. § 6972(a)(1)(B) (1976) and/or the federal Water Pollution Control Act (Clean Water Act) at 33 U.S.C. § 1365 (1972). See http://www.oag.state.ny.us/media_center/2007/feb/New%20York%20-%20RCRA%20Notice%20of%20Intent%20to%20Sue.pdf. The New York State Department of Environmental Conservation (NYS DEC) has also entered into consent orders with the noticed parties, including: Phelps Dodge Refining Corporation, Order on Consent (CSO Order), NYS DEC Case # W2-0188-8152 (1999); Phelps Dodge Refining Corporation, Order on Consent (CSO Order), NYS DEC Case # D2-0001-02-06 (2002); and ExxonMobil Corporation, Order on Consent (CSO Order), NYS DEC Case # D1-0001-02-06 (2004). Copies and a complete list of consent orders are on file with NYS DEC.

⁶⁹ See Appendix E.

B. Scope of Investigation Submitted to EPA in Creekwide Work Plan

The City requests that EPA critically evaluate the March 2008 Creekwide Remedial Investigation/Feasibility Study Work Plan for Newtown Creek submitted to EPA by the Newtown Creek Croup to ensure that the Remedial Investigation and subsequent work are performed to fully remediate the Creek and protect the surrounding community. Attached, as Appendix B, is the City's preliminary technical assessment of the Creekwide Remedial Investigation/Feasibility Study Work Plan. In summary, the City's review concludes that there are serious deficiencies in the Work Plan, including: 1) insufficient scope of proposed field work and research to produce adequate data to support a proper Feasibility Study, Record of Decision and Remedial Action that would be protective of human health and the environment; 2) improperly designed Remedial Investigation elements that are insufficient to provide data or information to support the goals of the Remedial Investigation or Feasibility Study (including artifacts of the Work Plan originally submitted to NYS DEC, which had a short-term focus for deliverables and was not conceived or intended to satisfy the Superfund process); and, 3) an inaccurate and incomplete Conceptual Site Model that fails to recognize numerous historical industrial sources of contamination or incorporate informative and illuminating existing environmental data for Newtown Creek.

III. Projects and Initiatives Potentially Impacted by a Superfund Designation

A. NYC DEP Capital Work and Water Quality Improvement Projects

In accordance with the CWA and the EPA's Combined Sewer Overflow ("CSO") Policy, NYC DEP has committed to undertake a number of projects in Newtown Creek to reduce CSOs, capture floatables, increase dissolved oxygen ("DO") levels and perform dredging. These projects will improve water quality, mitigate seasonal odors, and improve quality of life in surrounding neighborhoods. They will also enable the creation of expanded open space, access to the waterfront, and new market-rate and affordable housing in Greenpoint, Brooklyn. Approximately 330,000 people live within the 7,441 acre (11.6 mi²) Newtown Creek watershed area, 83 percent of whom are served by the combined sewer systems that flow to either to the Bowery Bay or Newtown Creek Waste Water Treatment Plants ("WWTPs" also known as Water Pollution Control Plants or "WPCPs").⁷⁰ Although the system can handle flows in dry weather, wet weather can cause CSO discharge into Newtown Creek. Existing and planned improvements will direct hundreds of millions of dollars towards CSO abatement and rehabilitation of the Creek. During the planning process for the CSO program and capital improvements, NYC DEP has consistently reached out to and received strong support from the community and elected officials.⁷¹ The City is concerned that a final listing on the NPL could have negative impacts on various improvement projects already planned and budgeted for Newtown Creek and could create a conflict between the City's existing obligations, particularly with regard to CSO abatement, and new mandates or constraints imposed pursuant to placement on the NPL.⁷²

1. Combined Sewer Overflow Abatement Work

Pursuant to the NYS DEC CSO Consent Order, NYS DEC Case # CO2-20000107-8, NYC DEP is required to undertake specific measures to improve water quality in Newtown Creek.⁷³ The proposed plan provides for floatables control, bending weirs, a Dutch Kills relief sewer⁷⁴ and environmental dredging of nearly 170,000 cubic yards of material in Maspeth Creek,

⁷⁰ N.Y. CITY DEP'T OF ENVTL. PROT., DRAFT WATERBODY/WATERSHED FACILITY PLAN REPORT, CITY-WIDE LONG TERM CSO CONTROL PLANNING PROJECT, NEWTOWN CREEK (June 2007).

⁷¹ Public meetings were held on October 25, 2006; December 13, 2006; March 21, 2007; and May 23, 2007.

⁷² The City notes that the possible conflict between EPA's management of Newtown Creek as an NPL-listed site and the CSO abatement work previously mandated in consent orders implicates the spirit if not the letter of Executive Order 12866. See 58 Fed. Reg. 51735, 51739 (Oct 4, 1993).

⁷³ NYC DEP's proposed modifications to the CSO Consent Order remain under NYS DEC review. N.Y. CITY DEP'T OF ENVTL. PROT. ("NYCDEP"), DRAFT WATERBODY/WATERSHED FACILITY PLAN REPORT, CITY-WIDE LONG TERM CSO CONTROL PLANNING PROJECT, NEWTOWN CREEK (June 2007); HydroQual Environmental Engineers and Scientists, P.C. and NYCDEP, Technical Justification for Consent Order Modification Request (Apr. 8, 2009) (on file with NYCDEP).

⁷⁴ N.Y. CITY DEP'T OF ENVTL. PROT. ("NYC DEP"), DRAFT WATERBODY/WATERSHED FACILITY PLAN REPORT, CITY-WIDE LONG TERM CSO CONTROL PLANNING PROJECT, NEWTOWN CREEK (June 2007);

East Branch and English Kills.⁷⁵ The planned CSO work will reduce CSOs into Newtown Creek by an estimated 235 MG/year, and into the East River by 90 MG/year, for a total reduction of 325 MG/year.⁷⁶ Collectively, the proposed CSO work is anticipated to attain Class SD DO > 3 mg/L, reduce floatable debris from CSOs, decrease pathogen concentrations, greatly improve the benthic habitat at the head end of the tributaries, reduce seasonal odors, and improve the quality of life for nearby residents and businesses. The City has planned a \$60 million relief sewer and regulator modifications at Dutch Kills, and an additional expenditure of \$60 million for bending weirs and floatable controls. This is in addition to the \$164 million worth of projects that could be affected by a final listing to the NPL. In total, the planned CSO work will cost approximately \$280 million and is currently funded in New York City's capital budget.

NYC DEP has started implementing elements of the planned CSO work, and has already observed the positive effects of the improvements. NYC DEP's aeration facility in Upper English Kills, which cost \$15.7 million, was placed into operation on December 31, 2008 and was fully activated on June 25, 2009. Since the start of operation, the facility has resulted in significant increases in DO levels from 0 mg/L to above 3 mg/L, within the Kills. NYC DEP continues to monitor improvements in water quality.

2. Capital Improvement Projects: East River Sludge Dock Relocation

Additional capital improvement upgrades to the Newtown Creek WWTP include construction to relocate existing sludge facilities from the East River to Newtown Creek, to enable development of affordable housing and enlargement of a waterfront park within the area currently occupied by the existing facilities as shown in Figure 1 (page 17). Components of this work include:

- (a) Construction of new permanent sludge docks within Newtown and Whale Creeks and a new sludge storage tank at Whale Creek;
- (b) Demolition of the existing East River sludge dock and associated sludge storage tank; and,

HydroQual Environmental Engineers and Scientists, P.C. and NYC DEP, Technical Justification for Consent Order Modification Request (Apr. 8, 2009) (on file with NYC DEP). The new interceptor/relief sewer in Dutch Kills will convey more flow to NYC DEP's Bowery Bay Water Pollution Control Plant. The floatable controls and bending weirs at key regulators/outfalls will reduce floatables discharges and convey more wet weather flow to the Newtown Creek WWTP. These elements have an estimated construction cost of about \$120 million.

⁷⁵ Memorandum from Carol E. Fenves, Chief Contracting Officer, N.Y. City Dep't of Env't. Prot. ("NYC DEP") to Vincent Sapienza, Deputy Comm'r, NYC DEP, et al., (Sept. 21, 2009) (on file with NYC DEP); NYC DEP, DRAFT WATERBODY/WATERSHED FACILITY PLAN REPORT, CITY-WIDE LONG TERM CSO CONTROL PLANNING PROJECT, NEWTOWN CREEK (June 2007). Environmental dredging design work is projected to take place between August 2011 and December 2015. The actual dredging work is anticipated to commence in April 2017 and be completed by April 2019. NYC DEP currently estimates that upwards of 170,000 cubic yards of material will be dredged and capped with two feet of clean fill. The preliminary estimated cost of this project is approximately \$70 million.

⁷⁶ *Id.*

- (c) Navigational dredging to ensure that newly acquired motorized sludge vessels can access the newly constructed Whale Creek sludge dock.

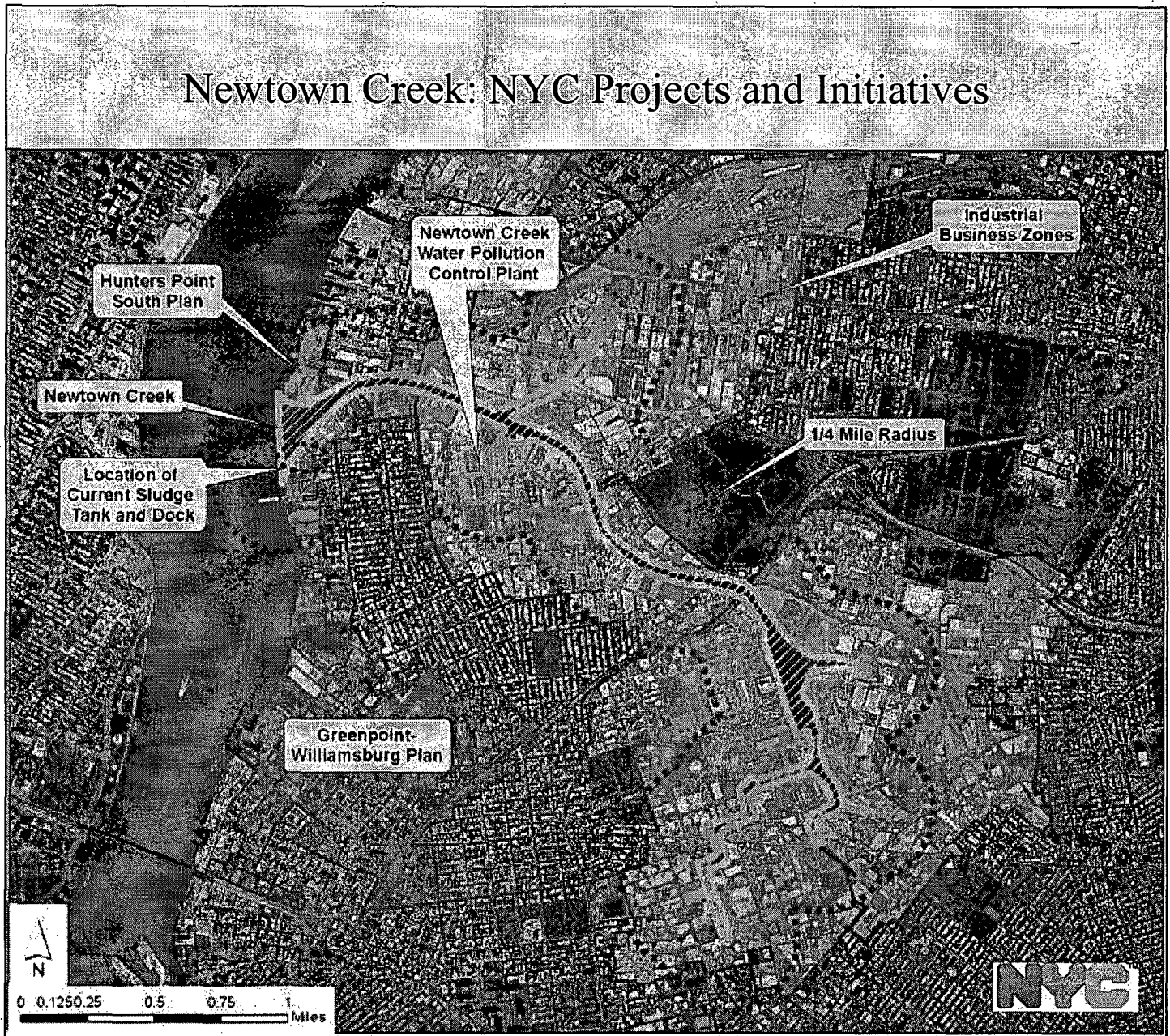
To support the proposed navigational dredging, NYC DEP commissioned a Sediment Sampling and Analysis Plan ("SSAP"). The SSAP provides the basis of analysis for City Environmental Quality Review ("CEQR"), satisfies permitting criteria, determines maintenance (vs. remediation) dredging, develops sediment testing consistent with NYS DEC and NJ DEP regulatory requirements, provides a baseline for in-water management during dredging operations, and generates data on dredged material management for upland treatment and/or disposal considerations. Sampling under the SSAP was performed in March 2009. The SSAP sampling results were delivered to NYS DEC and the Corps in August 2009 and discussed in a meeting with NYS DEC and the Corps on August 12, 2009. It was determined that none of the potential sediment composites exceed the Toxicity Characteristic Leaching Procedure ("TCLP") or Resource Conservation and Recovery Act ("RCRA") criteria. Therefore, the proposed dredged material can be characterized as "non-hazardous waste" for disposal purposes.⁷⁷ On December 2, 2009, NYC DEP submitted a Joint Application for the dredging operation, accompanied by the SSAP Report and its findings, to NYS DEC and the Corps.

Navigational dredging is scheduled to commence staging activities in 2011 with actual dredging starting in July 2012 and ending in December 2012, at a projected cost of \$32 million. Navigational dredging will consist of dredging approximately 22,000-30,000 cubic yards of material from both Newtown and Whale Creeks.⁷⁸ Assuming that the dredging proceeds, construction of the new dock at Whale Creek and demolition of the existing East River dock is scheduled to commence in September 2011, and conclude in November 2013, at a projected cost of \$66 million. Demolition of the existing facilities will enable that property to be used for the development of affordable housing, open space, and improved access to the East River. Local elected officials and affordable housing proponents have advocated for this work to begin as quickly as possible, and have expressed their strong support for this planned end-use.

⁷⁷ HydroQual Environmental Engineers and Scientists, P.C., and N.Y. City Dep't of Env'tl. Prot., Water and Sediment Quality Field Sampling and Analysis Plan, English Kills Phase I Aeration Facility Pilot Study (December 2008).

⁷⁸ Greeley and Hansen, L.L.C. et al., and N.Y. City Dep't of Env'tl. Prot., Joint Application: United States Army Corps of Engineers, New York State Department of Environmental Conservation, Newtown Creek Water Pollution Control Plant Maintenance Dredging of Newtown Creek and Whale Creek Canal (December 2009). The dredging will target depths of about 18-19 feet in Newtown Creek and 20-21 feet in Whale Creek.

Figure 1:



3. The City's Concerns Regarding the Proposed Listing to the NPL

The City is concerned that components of the planned CSO work and portions of the planned capital improvement projects could give rise to claims of liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The City and its contractors could potentially face liability for the movement of contaminated sediments or the creation of new conditions that would need to be readdressed during Superfund investigation or remedial activities. Regarding the planned CSO and water quality work, the City is concerned that the construction and operation of the in-stream aeration systems as well as the proposed environmental dredging might have the potential to disturb or transport Creek sediment or leach metals from the sediment into the water column.⁷⁹ If sediments become suspended within the water column, contamination may migrate to nearby locations within the Creek's tributaries.

The courts have construed CERCLA liability liberally to achieve the statute's remedial goals. Under the statute, the re-release or disturbance of hazardous materials previously produced by another party could be considered a basis for liability. The City is concerned that if the NYC DEP planned work causes the movement, dispersal or re-release of contaminants within Newtown Creek or its tributaries, the City could be subject to a claim of CERCLA liability. These issues need to be resolved before NYC DEP can proceed with the planned work on the current schedule. Regarding the capital improvements, the City is concerned that placement on the NPL and associated activities would prevent NYC DEP from performing the navigational dredging in Newtown Creek and Whale Creek necessary for the new Newtown Creek WPCP sludge storage and docking facilities.

The City has had several meetings with EPA's Region 2 staff and received verbal assurances that navigational dredging plans are generally acceptable and consistent with EPA's proposed nomination of Newtown Creek to the NPL. In addition, the City has requested that EPA provide written assurance for the dredging and CSO projects so that the City can proceed with necessary procurements without delay.

The City is not only concerned about potential liability or delay in work schedules, but also that planned work may later be found to be inconsistent with - or otherwise hinder, impede or interfere with - the performance of required remedial investigation or remedial actions in Newtown Creek. This could necessitate that work be halted or even reversed. For example:

- (a) Final listing on the NPL could impact the compatibility of the existing aeration system that was placed online in June 2009, and the design work associated with the remaining phases of aeration;

⁷⁹ HydroQual Environmental Engineers and Scientists, P.C. and N.Y. City Dep't of Env'tl. Prot. ("NYC DEP"), Water and Sediment Quality Field Sampling and Analysis Plan, English Kills Phase I Aeration Facility Pilot Study (December 2008). As part of the Phase 1 Aeration, NYC DEP developed plans to collect three years of sampling data in order to better understand risks associated with the aeration facilities; without that dataset, it remains unclear how severe risks truly are. Though the second phase of aeration has yet to be designed, NYC DEP plans to install the second phase in the base of the Creek.

- (b) If EPA performs remedial dredging within the tributaries after NYC DEP has installed additional permanent aeration facilities, EPA may require the removal of those aeration facilities to complete its work. This effort would occur at a significant financial cost to the City, estimated to be \$1 million per aeration system,⁸⁰ as may adversely impact aquatic life, which is expected to improve in response to the higher DO environment; and,
- (c) It is unclear whether the Creek would be open for transportation purposes during investigation and remedial activities, which could have a major impact on the ability of the new motorized sludge vessels⁸¹ to access the new sludge docks in Newtown and Whale Creeks.

Without adequate commitment from EPA, listing Newtown Creek on the NPL could delay or halt planned improvements and result in additional costs to the City. These are undesirable impacts for any project, but particularly undesirable in this context given the current economic climate.

⁸⁰ N.Y. City Dep't of Env'tl. Protection (NYC DEP), English Kills Removal and Reinstallation of Diffuser Piping Cost Estimate (Dec. 22, 2009) (on file with NYC DEP).

⁸¹ The Newtown Creek sludge vessels will cost \$84,226,780, and are currently expected to be funded entirely by federal stimulus funding. The contract was awarded on November 13, 2009 and will be registered with the New York City Comptroller's Office in the near future. Contract documentation is on file with NYC DEP.

B. New York City Initiatives and New Development

As part of a City-wide effort to reactivate the waterfront and create more affordable housing and recreational open space for all New Yorkers, the City has embarked upon two major land use initiatives adjacent to Newtown Creek. These are the 2008 Hunter's Point South Plan ("HPS") and the 2005 Greenpoint-Williamsburg Land Use and Waterfront Plan ("CPW"). HPS covers a 30 acre area adjacent to the north side of the mouth of Newtown Creek in Queens, and CPW covers 184 blocks along the East River and the south side of the Creek in Brooklyn as shown in Figure 1 (page 17). Collectively, these initiatives will redevelop formerly industrial and currently vacant or underutilized waterfront parcels along the East River and Newtown Creek into new waterfront parks, open space networks, and medium and high-density residential buildings, including affordable housing, community facilities and retail uses. Both of these initiatives address issues of great concern to local communities and local elected officials, and land use actions to realize both plans have been enacted by the New York City Council.

The City is concerned that critical components of both HPS and CPW may be delayed or deferred due to the proposed listing of Newtown Creek to the NPL, since many related activities could be subject to EPA review and approval. Activities of potential interest to EPA that are necessary for the completion of these projects include, but are not limited to, disturbance of sediment and water within the Creek, remediation of Brownfields for use as redevelopment sites, construction along the HPS and CPW shorelines, acquisition of private property to facilitate open space development, creation of new access to the waterfront and new direct contact locations to the Creek. The City will fully inform EPA of the ongoing and planned projects in and around Newtown Creek so that the agency can engage with the City and the affected communities to move these community-supported projects forward. The City seeks early direction from EPA on the nature and extent of its interest in these various activities, expedited engagement by EPA for activities that may require EPA's direct concurrence or approval, such as activities that have the potential to interfere with the Remedial Investigation or Remedial Action, expedited review for projects that require EPA's prior approval before other agencies can act, (e.g. permitting of regulated activities in and around the Creek), and expedited comment from EPA on community safety and development-related issues and concerns that may arise. A description of requested engagement appears in Section IV *infra*.

1. Hunter's Point South Plan⁸²

Hunter's Point South will be constructed on approximately 30 acres of land bounded by the East River, Newtown Creek, Second Street, and 50th Avenue. The site will consist of seven blocks,⁸³ a new public street network, a public ferry terminal, and 11 acres of public parks, 10 acres of which will be located along the Newtown and East River shorelines. The shoreline will be a mix of rip-rap and bulkhead and will be constructed in accordance with NYS DEC permits, which were issued in 2004. Approximately 3,000 middle-income housing units and 2,000 market rate units will be developed with ground floor retail and community facility uses. This effort is a critical component of the Mayor's New Housing Marketplace plan, which is the largest municipal affordable housing program in the nation and aims to create and preserve 165,000 units of affordable housing.⁸⁴ In addition, a 1,100-seat public intermediate/high school will be constructed in HPS. Hunter's Point South is estimated to create approximately 4,270 new jobs from private construction-related expenditures and 290 new operations jobs.⁸⁵ In addition, a 7.5-acre privately-owned parcel adjacent to HPS was rezoned to permit residential development. This parcel is projected to contribute an additional 1,650 dwelling units and 2.4 acres of public

⁸² The HPS plan grew out of a previous initiative known as Queens West, which was approved in 1990 for 74 acres of land along the East River, including the Hunter's Point South site. The general plan consisted of residential neighborhoods in the northern and southern thirds of the site with a commercial core in the center. By 2006, the northern third of the site was nearing completion, while the center and southern sections of the site, totaling approximately 30 acres, remained vacant or significantly underused, leading the City to consider purchasing and developing the property to help meet a growing demand for affordable housing. In October 2006, the City reached an agreement with the two land owners, the Port Authority of New York and New Jersey and New York State, to purchase the site and remove it from the Queens West project. A master planning effort was then initiated by the City that included Hunter's Point community residents and businesses, local elected officials, and city-wide housing and development groups, resulting in a plan that was approved unanimously by the City Council in November 2008. N.Y. City Ofc. of the Deputy Mayor for Econ. Dev't., *Final Environmental Impact Statement for the Hunter's Point South Rezoning and Related Actions*, Chapter 1 (Sept. 12, 2008); N.Y. City Council, Resolutions 1695, 1696, and 1697 (2008).

⁸³ Census data for the tract abutting the two northern blocks shows a median income of \$66,106 with 8.33 percent of households living below the poverty line. See N.Y. City Ofc. of the Deputy Mayor for Econ. Dev't., *Final Environmental Impact Statement for the Hunter's Point South Rezoning and Related Actions*, Figure 3-3 (Sept. 12, 2008).

⁸⁴ "Affordable housing" consists of dwelling and rooming units and eligible common areas that are or will be restricted, pursuant to a regulatory agreement, to occupancy by low-income, moderate-income or middle-income households or supportive housing. See N.Y. City Zoning Resolution, § 23-911 (amended July 29, 2009) (defining "affordable housing" and applicable income categories).

⁸⁵ Jobs from construction expenditures include both people who are directly employed by on-site activities and off-site jobs that result from the construction activity (*i.e.*, indirect and induced jobs). Construction jobs are represented in person-years of employment. (A person-year represents one person working full time for one year.) Operations jobs include only those directly employed on-site or by on-site businesses in full-time equivalents. These employment estimates reflect only jobs that are expected to be new to New York City. The total number of jobs associated with Hunter's Point South is 11,870 direct, indirect, and induced person-years from private construction activity and 475 direct on-site operations jobs. Because the Hunter's Point South redevelopment will displace some activity in other parts of the City, not all of these jobs are considered new. Documentation of job projections on file with N.Y. City Econ. Dev't Corp.

open space.⁸⁶

This fall, schematic designs for public streets, parks, and infrastructure were completed. In October 2009, the City began construction on the first phase of \$175 million planned in infrastructure improvements. The first phase includes the utilities and roadways for 900 units of housing (60% affordable), the school, and approximately five acres of waterfront open space. Demolition of buildings on the first two development blocks and site preparation for public street construction will begin in the first quarter of 2010. Community involvement in the park and street design has been ongoing and productive.

2. Greenpoint-Williamsburg Land Use and Waterfront Plan

The Greenpoint-Williamsburg Land Use and Waterfront Plan formed the basis of a rezoning enacted in 2005,⁸⁷ covering 184 blocks in Williamsburg and Greenpoint from the Williamsburg Bridge to Manhattan Avenue,⁸⁸ to facilitate the residential and mixed-use redevelopment of a largely vacant and underutilized industrial area along the East River and on nearby upland blocks.⁸⁹ On adoption of the rezoning, a number of commitments to create affordable housing and public open space were memorialized in a letter from the Mayor's Office to the City Council, which is attached as Appendix F.⁹⁰ Over its entire geographic reach, the GPW plan is expected to produce approximately 10,000 units of housing in the foreseeable future⁹¹ including approximately 3,500 units of affordable housing⁹² anticipated on an

⁸⁶ N.Y. City Ofc. of the Deputy Mayor for Econ. Dev't., *Final Environmental Impact Statement for the Hunter's Point South Rezoning and Related Actions*, Table 1-3 (Sept. 12, 2008).

⁸⁷ The Greenpoint-Williamsburg Plan is the culmination of efforts dating back to at least 1994, when the *Plan for the Brooklyn Waterfront*, produced by the New York City Department of City Planning, identified the potential for residential redevelopment of sites along the East River and the mouth of Newtown Creek. N. Y. City Dep't of City Planning, *Plan for the Brooklyn Waterfront* (1994). Local elected officials and community members have also been heavily involved in planning for the waterfront. In 2002, the Greenpoint and Williamsburg communities created the Greenpoint and Williamsburg Waterfront 197-A plans, pursuant to Section 197-a of the New York City Charter. Both of these Plans called for a comprehensive rezoning of the waterfront. Brooklyn Cmty. Bd. 1, *Greenpoint 197-A Plan* (2002); Brooklyn Cmty. Bd. 1, *Williamsburg Waterfront 197-A Plan* (2002). Public outreach for the Greenpoint-Williamsburg Plan began in 2002, and the Plan was approved by the New York City Council in May 2005. N.Y. City Council, Resolutions 962, 963, 964, 965, 966, and 967 (2005).

⁸⁸ The northern portion of the rezoned area, Greenpoint, is a mixed-use neighborhood that is home to a diverse and mixed-income population, including a large and longstanding Polish community and a smaller Latino community. In 2000, the median income of residents in the rezoned area near Newtown Creek was approximately \$32,000 and approximately 50% of the residents were foreign born. N.Y. City Dep't of City Planning, *Brooklyn Community District 1 Profile, Income and Education by Census Tract, 2000, and Age and Nativity by Census tract, 2000* (2008).

⁸⁹ See, e.g., N.Y. City Dep't of City Planning, *Proposed Greenpoint-Williamsburg Land Use and Waterfront Plan*, available at <http://www.nyc.gov/html/dcp/html/greenpointwill/greenoverview.shtml> (last visited Nov. 6, 2009).

⁹⁰ See Appendix F.

⁹¹ N.Y. City Dep't of City Planning, *Final Environmental Impact Statement for the Greenpoint-Williamsburg Rezoning*, App. G and App. J, (2005).

⁹² See footnote 84 *supra*.

assemblage of private and City-owned sites along the waterfront and upland.⁹³ In conjunction with the NYC Department of Parks and Recreation's Greenpoint-Williamsburg Open Space Master Plan, the CPW plan calls for the creation of a continuous network of public open spaces over two miles of shoreline. The space would consist of a 40 foot wide esplanade with larger parks and public open spaces at periodic intervals, anchored by a new 27.8 acre City park at Bushwick Inlet along the East River. This park and open space network will total approximately 50 acres.⁹⁴ The City has been working with a Community Advisory Board, made up of local residents and elected officials, to implement these and other project-based commitments, such as the pivotal plan to relocate the NYC DEP sludge handling facilities (see *supra* Section III.A.2). City Council members David Yassky of the 33rd District and Diana Reyna of the 34th District, who represent these areas, have been involved through the Community Advisory Board in advancing specific project-based commitments made as part of the rezoning in 2005.

As of June 2009, permits for approximately 4,000 dwelling units had been issued within the area rezoned under the plan.⁹⁵ Approximately 860 units of affordable housing have been completed or are under construction pursuant to the Inclusionary Housing program instituted through the rezoning.⁹⁶ The City has also approved special permits and open space plans for the 155 West Street development, located along the East River between Huron and India Streets.⁹⁷ The first public open space created in conjunction with private development under the plan opened in early 2009 at North 5th Street in Williamsburg, and is currently in use by the public. The first phase of the 27.8 acre Bushwick Inlet Park began construction in June 2009. The City is identifying a site for the relocation of MTA Emergency Response operations, which are currently based at 65 Commercial Street. When these and other operations are relocated, this area will become Box Street Park.⁹⁸ Once the NYC DEP East River sludge operations are relocated to Whale Creek, a portion of that site will be transferred to NYC DPR, in order to expand the current landlocked Newtown Creek Barge Park Playground and create a new waterfront amenity. Approximately one-quarter mile further south along the East River from

⁹³ See Appendix F.

⁹⁴ N.Y. City Dep't of City Planning (NYC DCP), *Greenpoint-Williamsburg Rezoning*, presentation given to City Planning Comm'n of the City of N.Y. on May 11, 2005, slides on file with NYC DCP; NYC DCP, *Greenpoint-Williamsburg: Waterfront Zoning, Public Access Requirements*, available at <http://www.nyc.gov/html/dcp/html/greenpointwill/greenwateraccessplan.shtml> (last visited Dec. 21, 2009).

⁹⁵ Memorandum from Steven Lenard, N.Y. City Dep't of City Planning, to Howard Slatkin and Pumima Kapur, N.Y. City Dep't of City Planning, *Annual Report on Housing Production in Greenpoint-Williamsburg Rezoning Area* (June 16, 2009).

⁹⁶ N. Y. City Ofc. of the Deputy Mayor for Econ. Dev't, *Greenpoint-Williamsburg Progress Briefing*, presentation given to Greenpoint-Williamsburg Cmty. Advisory Bd. on Dec. 9, 2009, slides on file with N.Y. City Ofc. of Deputy Mayor for Econ. Dev't.

⁹⁷ City Planning Comm'n of the City of N.Y., *Report C 090053 ZSK: In the Matter of An Application Submitted by 145 West Street LLC* (Mar. 2, 2009), available at <http://www.nyc.gov/html/dcp/pdf/cpc/090053.pdf>

⁹⁸ N. Y. City Ofc. of the Deputy Mayor for Econ. Dev't, *Greenpoint-Williamsburg Progress Briefing*, presentation given to Greenpoint-Williamsburg Cmty. Advisory Bd. (Sept. 10, 2009), slides on file with the N. Y. City Ofc. of Deputy Mayor for Econ. Dev't.

Newtown Creek, the City plans to start construction of a new park at the WNYC Transmitter Site by the summer of 2010. Additionally, the CPW plan will open formerly closed street ends at Kent and Java Streets along the East River south of Newtown Creek to increase public access to the water.⁹⁹

3. *Features Potentially Impacted by a Listing on the NPL*

(a) Projects that Involve Direct Creek Contact or Discharge

These City rezoning initiatives have provided a unique opportunity to address the need for more parks and open space in the burgeoning communities around Newtown Creek, and to create public access along reaches of the shoreline that have been closed throughout much of the City's modern history. As such, public open space is planned for the entire shoreline along Newtown Creek and the East River where development is anticipated. This will provide opportunities for public recreation and enjoyment of the waterfront, increased access to the water itself, and reconnect neighborhoods adjacent to the waterfront. Along the waterfront and within one quarter mile of Newtown Creek, 19 acres of open space are planned along 1.4 miles of shoreline.¹⁰⁰ Open space will consist of a balance between active and passive recreational space in the form of new sports fields, playgrounds, lawn/gathering spaces, an esplanade along the water's edge, natural areas, restored habitat and other public amenities. To the extent feasible, access to the water consistent with the Creek's water classification will be encouraged, and may include elements such as boat launches, get-downs, and soft edges as well as bulkheads.¹⁰¹

On privately owned sites along the waterfront, zoning requires that public open space be built by private developers and maintained for public use as a condition of development.¹⁰² In June 2009, the City acquired the land for HPS from the Port Authority for \$100 million.¹⁰³ The

⁹⁹ N.Y. City Ofc. of the Deputy Mayor for Econ. Dev't, *Greenpoint-Williamsburg Progress Briefing*, presentation given to Greenpoint-Williamsburg Cmty. Advisory Bd. on Dec. 9, 2009, slides on file with N.Y. City Ofc. of the Deputy Mayor for Econ. Dev't..

¹⁰⁰ Open space planned for HPS totals 11 acres (482,570 square feet) and 3,650 feet (0.69 miles) of accessible shoreline. Open space planned for GPW includes ten sites totaling 7.9 acres (343,033 square feet) and 3,996 feet (0.76 miles) of accessible shoreline. Steven Lenard, N.Y. City Dep't of City Planning, *Project Note: Development Projections for the Greenpoint-Williamsburg and Hunter's Point South Rezoning's* (Nov. 26, 2009).

¹⁰¹ N.Y. City Ofc. of the Deputy Mayor for Econ. Dev't, *Final Environmental Impact Statement for the Hunter's Point South Rezoning and Related Actions*, 1-20 to 1-22 (Sept. 12, 2008), available at http://www.ci.nyc.ny.us/html/oec/html/ceqr/08DME0060_FEIS.shtml; N.Y. City Dep't of Parks and Recreation, *Greenpoint-Williamsburg Waterfront Open Space Master Plan* (2008), available at http://www.nycgovparks.org/web/download/download.php?file=/sub_your_park/greenpoint_williamsburg_waterfront/images/greenpoint_williamsburg_waterfront_masterplan.pdf. While open space in GPW is subject to waterfront zoning and will be influenced by NYC DPR's master plan for the area, the precise elements of that open space have not yet been determined because much of the open space in GPW will be created in conjunction with private developments that have not yet submitted open space plans for City approval.

¹⁰² See, e.g., N.Y. City Zoning Resolution, § 62-831 (2005).

¹⁰³ See N.Y. City Ofc. of the Mayor, *Mayor Bloomberg Announces City's \$100 Million Acquisition of the 30-Acre*

City plans on transferring the development sites to private entities for development pursuant to the zoning, but will retain ownership of and construct the mapped streets and parkland. Most of the land covered under the CPW plan is privately owned and will be developed by private entities pursuant to zoning, which reflects the principles of the CPW plan. The zoning encourages and provides a mechanism for the transfer of that privately developed open space to City ownership. Therefore, public open space cannot be built until these privately-owned sites are developed.

The City has serious concerns about the potential impact that listing Newtown Creek on the NPL could have on HPS and CPW. The City's redevelopment plans place a high priority on water-dependent uses in order to take full advantage of the unique recreational opportunities along the waterfront. Those uses could be severely restricted, delayed or made more expensive as a result of a listing on the NPL. Faced with the financial and legal uncertainty that can result from the Creek being placed on the NPL, private development of upland affordable and market-rate housing, and the open space it will enable, may similarly be deferred or abandoned.¹⁰⁴

As mentioned, the HPS and CPW plans include components that provide direct access to or structures in and abutting Newtown Creek. For example, the HPS plan includes construction of a kayak and boat launch on the north shore of Newtown Creek.¹⁰⁵ On the south side of Newtown Creek, two get-downs already exist, namely at the Newtown Creek Nature Walk near Whale Creek and at the Manhattan Avenue Street End Park. While development on parcels along Newtown Creek that are part of the CPW plan has not yet been designed, the City's waterfront zoning and Open Space Master Plan for this area encourage direct access to the water.¹⁰⁶

The City is encouraging a variety of alternative treatments for the waterfront edge as part of future development work in both HPS and CPW. Along with the bulkhead walls that currently exist, other engineered edges will include rip-rap and hybrid rip-rap constructions, combined with plantings, and other erosion control structures. Taking into account the physical and natural character of the shoreline, step-down terraces or staggered walls and other identified treatments, as well as true soft edges comprised of restored natural areas, may be implemented. In addition, plans call for the restoration of natural wetlands at the southern end of the HPS site,

Hunter's Point South Parcel, Press Release 289-09 (June 25, 2009).

¹⁰⁴ See, e.g., footnotes 112, Error! Bookmark not defined.3, Error! Bookmark not defined.1 *infra*.

¹⁰⁵ N.Y. City Econ. Dev't Corp. and ARUP/Thomas Balsley Assocs./Weiss/Manfredi, *Hunter's Point South Waterfront Park: Schematic Design*, presentation given to Land Use Cmte., Queens Cmty. Bd. 2 on Nov. 19, 2009, slides available at <http://www.nycedc.com/ProjectsOpportunities/CurrentProjects/Queens/HuntersPointSouth/Documents/Hunters-Point-South-Landuse-Committee-Nov-19-09.pdf>

¹⁰⁶ N.Y. City Dep't of City Planning, *Waterfront Text Amendment*, available at <http://www.nyc.gov/html/dcp/html/waterfront/index.shtml> (last visited Dec. 13, 2009); N.Y. City Dep't of Parks and Recreation, *Greenpoint-Williamsburg Waterfront Open Space Master Plan* (2008), available at http://www.nycgovparks.org/web/download/download.php?file=/sub_your_park/greenpoint_williamsburg_waterfront/images/greenpoint_williamsburg_waterfront_masterplan.pdf (last visited Dec. 20, 2009).

located along Newtown Creek, for a substantial restoration in the conceptual plan for Bushwick Inlet located along the East River in CPW and for a relatively small wetland treatment at the WNYC Transmitter Site among other locations in CPW.¹⁰⁷ Listing the Creek would raise unique issues for these activities and work proposed within or touching the Creek.

The City is concerned that EPA may restrict public access to the Creek in general, disrupting the two existing open space sites along the Creek that currently provide get-downs, as well as the City's plans for additional open space featuring water-dependent recreational uses. EPA should inform the City and community early in the process – for example, before plans for a boat launch proceed – whether listing will restrict water access so as to make such amenities unusable.

The City is also concerned that the proposed listing will delay regulatory review and permitting of water or sediment-based work. For example, work in or proximal to Newtown Creek already requires permits from the NYS DEC and the Army Corps; this work will also require EPA approval. This additional layer of regulatory oversight could have significant implications by adding new process or restrictions and associated delays of scheduled project milestones.

The City's plans also include new direct discharges into the Creek. Development of HPS will require construction of a new stormwater outfall on 2nd Street, which has already been approved by the NYS DEC and the Army Corps.¹⁰⁸ Similar work may also be required for sites within the CPW plan. In addition, current open space plans anticipate that overland flow from heavy rain events would be discharged directly into Newtown Creek. This scenario is generally acceptable to NYS DEC and NYC DEP. The groundbreaking for this work occurred in October 2009.¹⁰⁹

(b) Upland Projects that do not Involve Direct Creek Contact

(i) Development of New Market Rate and Affordable Housing, Schools and Commercial Development

Creating additional housing, particularly affordable housing is a major goal of the Bloomberg Administration and both the HPS and CPW plans. The HPS and CPW plans include innovative zoning mechanisms to incentivize the development of affordable housing on privately owned sites and coordinated efforts to develop affordable units on City-owned sites. Projections

¹⁰⁷ N.Y. City Dep't of Parks and Recreation, *Greenpoint-Williamsburg Waterfront Open Space Master Plan* (2008), available at http://www.nycgovparks.org/web/download/download.php?file=/sub_your_park/greenpoint_williamsburg_waterfront/images/greenpoint_williamsburg_waterfront_masterplan.pdf (last visited Dec. 20, 2009), 5-38–39.

¹⁰⁸ Permitting documents on file with N.Y. City Ofc. of the Deputy Mayor for Econ. Dev't.

¹⁰⁹ See generally N.Y. City Ofc. of the Deputy Mayor for Econ. Dev't, *Final Environmental Impact Statement for the Hunter's Point South Rezoning and Related Actions*, Chapters 11, 12, 13 (Sept. 12, 2008), available at http://www.ci.nyc.ny.us/html/oec/html/ceqr/08DME006Q_FEIS.shtml. Additional documentation of work in progress on file with Office of the Deputy Mayor for Economic Development.

for HPS and CPW anticipate that approximately 9,215 dwelling units will be created on sites within one quarter mile of Newtown Creek in the foreseeable future. Additional sites within these areas where development is permitted under the rezonings have the potential to create approximately 12,909 housing units. Approximately 3,102 of the dwelling units planned on City-owned sites within a one quarter mile of the Creek will be affordable.¹¹⁰ Privately-owned sites within a one quarter mile of Newtown Creek were projected to produce 843 affordable dwelling units.¹¹¹

Realization of these City goals will require both the creation of, and significant improvements to, infrastructure on both sides of the Creek. Among such activities are \$175 million of utility and street construction in HPS including the demolition of pavements and structures adjacent to the Creek, installation of separate stormwater sewer systems, and construction of new stormwater outfalls for CSO reduction. Similar work would be required to build out sites within the CPW plan, though planning and designs for those sites have not yet been prepared.

While these planned developments do not involve direct contact with the Creek, the City is concerned that listing on the NPL could deter economic investment in the vicinity of the Creek. The City's concerns are threefold. The uncertainty and potential stigma caused by listing a site on the NPL,¹¹² particularly a complex urban waterway, may discourage new economic investment and development. The City is concerned that the acquisition of public or private financing required for the development of market-rate and affordable housing units will be complicated by the proximity of the development sites to a proposed Superfund location. Studies have repeatedly shown, and courts have repeatedly held, that the presence of a nearby Superfund site decreases property values.¹¹³ This stigma is not limited to a decline in property

¹¹⁰ See footnote 844 *supra*.

¹¹¹ N.Y. City Dep't of City Planning ("NYCDGP"), *Final Environmental Impact Statement for the Greenpoint-Williamsburg Rezoning* App. G and App J, (Mar. 4, 2005); Steven Lenard, NYCDGP, *Project Note: Unit Counts for Hunter's Point South Project* (Nov. 6, 2009); Steven Lenard, NYCDGP, *Project Note, RE: Development Projections for Greenpoint-Williamsburg Rezoning* (Nov. 6, 2009).

¹¹² See, e.g., *Kent County Delaware Levy Ct. v. U.S. E.P.A.*, 963 F.2d 391, 393 (D.C. Cir. 1992) (courts "must remain aware that placement on the National Priorities List has serious consequences for a site's owner"); *SCA Servs. of Indiana, Inc. v. Thomas*, 634 F. Supp. 1355, 1364 (N.D. Ind. 1986) (stating that "designation of [a] parcel as having a problem serious enough to warrant E.P.A. and Superfund cleanup will mark that property as an unmarketable pariah for years to come"); N.Y. State Bd. of Equalization and Assessment, Vol. 9: Opinions of Counsel No. 58 (rev. Apr. 1992) (noting research indicating that properties placed on the Superfund list "frequently require cleanup costs far in excess of the fair market value of the same property without contamination" and were accordingly found to be "unmarketable and, therefore, without value"); Lorraine Lewandrowski, *Toxic Blackacre: Appraisal Techniques & Current Trends in Valuation*, 5 ALB. L.J. SCI. & TECH. 55, 58-70 (1994) (discussing nature and prevalence of Superfund stigma and its relationship to traditional methods of real property appraisal).

¹¹³ See, e.g., *In re Custom Distrib. Servs.*, 216 B.R. 136, 158 (Bankr. D.N.J. 1997) (reducing property value by 20% "for the stigma of the status of the property as a Superfund Site"); *Mead Corp. v. Browner*, 100 F.3d 152, 153 (D.C. Cir. 1996) (noting that the circuit has "clearly recognized the harmful effects of being linked to a site placed on the NPL"); *Kent Co. Delaware Levy Ct.*, *supra*; *SCA Servs. of Indiana*, *supra*; U.S. Env'tl. Prot. Agency, *Office of Superfund Remediation and Tech., Challenges in Applying Property Value Studies to Assess the Benefits of the*

values based on public information about pollution. Superfund designation of the entire Creek virtually assures that individual property owners along its waterfront will be caught up in massive, complex and expensive CERCLA litigation for years to come. Prospective purchasers and lenders, wary of the costs and risks associated with such litigation, may seek to direct their resources elsewhere. The willingness of private parties to invest in properties, such as is necessary to enable HPS and GPW to succeed, is based on the anticipated income from the resulting development, which depends in part on appraised values, the potential for takeout mortgages for sales and rental income. Because a listing could decrease appraised values, financing will be more difficult, and the uncertainty inherent in the Superfund process reduces the likelihood of investment in the area.

These financial considerations are exacerbated by protracted and expensive litigation over potential Superfund liability.¹¹⁴ The City is concerned that without clear guidance from EPA to property owners, of both potential development sites and industrial properties, as to whether an individual property is a potential source of liability and if so, how to assess potential liability, the uncertainty may further hinder development. Additional evidence of the difficulty in financing development in proximity to a Superfund site has been put forth by the Federal Housing Administration ("FHA"). A June 12, 2009, FHA letter announced that the agency is implementing a new approval process for condominium projects to insure mortgages on individual units under Section 203(b) of the National Housing Act in accordance with the passage of the Housing and Economic Recovery Act of 2008.¹¹⁵ The letter includes the

Superfund Program, available at <http://www.epa.gov/superfund/programs/recycle/pdf/PropertyStudy.pdf> (2009) (noting that Superfund designation typically reduces property values beyond diminution levels expected from the contamination alone; contamination initially decreases property values and then Superfund designation causes further decline); N.Y. State Bd. of Equalization and Assessment, Vol. 9: Opinions of Counsel No. 58, *supra*; Kent D. Messer et al., *Can Stigma Explain Large Property Value Losses? The Psychology and Economics of Superfund*, 33 ENVTL. AND RESOURCE ECON. 299-324 (2006) (finding that when Superfund site cleanup is delayed between 10 and 20 years, the benefit of the cleanup, as captured in residential property values, is lost because property values do not recover during the cleanup period); Jill J. McCluskey and Gordon C. Rausser, *Stigmatized Asset Value: Is it Temporary or Permanent?* (2003), available at SSRN: <http://ssrn.com/abstract=213892> (concluding based on a study of real estate valuation in Dallas County, Texas that once environmental contamination becomes associated with a particular neighborhood, its property values are stigmatized indefinitely, past the completion of cleanup).

¹¹⁴ The City is concerned that the recent Supreme Court decision in *Burlington Northern and Santa Fe Railway Co. v. United States*, 556 U.S. ___, 129 S. Ct. 1870 (2009), will add an additional layer of litigation delays and disincentivize PRPs from participating in a traditional Superfund process or leave a larger orphan share. Practitioners and others have already recognized that the holding in *Burlington Northern* will make divisibility findings much more commonplace in Superfund cost recovery cases, increase PRPs' leverage in settlement discussions, and leave fewer polluters' dollars available to fund cleanups. See Peter L. Gray and Christopher Baker, *Divvying Up the Tab: Implications of Burlington Northern on Superfund Apportionment*, CHEMICAL WASTE LITIGATION REPORTER (June 2009), Jason L. Jurkevich, *Stopping CERCLA Liability In Its Tracks? Supreme Court Limits Joint And Several Liability, Narrows Arranger Liability*, METROPOLITAN CORPORATE COUNSEL (July 2009).

¹¹⁵ Federal Hous. Admin., U.S. Dep't of Hous. and Urban Dev't, Mortgagee Letter, "Condominium Approval Process – Single Family Housing," available at http://portal.hud.gov/portal/page/portal/FHA_Home/lenders/mortgagee_letters/2009_mortgagee_letters/09-ML-19%20%20Condominium%20Approval%20Process%20-%20Final.pdf, Item IV. D. (Document No. 2009-19, last visited Dec. 18, 2009).

requirement that a “lender must avoid” a property “[i]f the appraiser identifies an environmental condition or the lender is aware of an existing environmental condition ... [such as] a property [that] is located within 3,000 feet of ... a site on an EPA Superfund (NPL) list...”¹¹⁶ Therefore, the City, which uses HUD funds to create affordable housing and invest in infrastructure and parks, would not be able to use such funding proximal to the proposed Newtown Creek site without EPA support and concurrence on this matter.

The City’s second concern regarding planned development is additional regulatory oversight and the delay that additional regulatory layers can impose on a planning and construction process. The City is concerned about the scope of EPA review of regulatory actions not directly affecting the Creek, including development and implementation of stormwater best management practices, beneficial reuse of stormwater, upland soil removal and disposal, and use and beneficial reuse of fill. Redevelopment plans will entail major subsurface construction work for utilities, parking garages and foundations for high-rise residential and commercial buildings. The City’s development plans emphasize the importance of sustainable best practices regarding stormwater management. Open space features for stormwater collection, storage, and infiltration are encouraged, as well as the reuse of stormwater to help sustain landscape features and for utilization in heating and cooling systems.¹¹⁷ EPA should be clear about the nature, if any, of its interest in such activities with regard to the proposed listing, and whether it anticipates playing any role in the approval or permitting of such activities.

A third City concern pertains to the complications that may arise out of developers’ interest in enrolling in the New York State Brownfield Cleanup Program or New York City’s newly created Local Brownfield Cleanup Program. State and City Brownfield Cleanup Programs (“BCPs”) are productive means to encourage remediation and revitalization of contaminated, abandoned or blighted properties, such as those upland of Newtown Creek. However, due to the proposed listing on the NPL, there may be new and substantial risk for volunteers of these programs to proceed with cleanups since currently there is no agreement between EPA and the City or State of New York to provide compliant program enrollees with a release from CERCLA liability. The City is concerned that this will unnecessarily depress remediation and redevelopment efforts on upland sites and therefore, the City requests that EPA work with the City and the State of New York to address this deficiency by granting CERCLA liability release to property owners who successfully complete, or who have successfully completed, these Federally recognized cleanup programs.

(ii) Waterfront Open Space Projects

In addition to projects that will provide direct contact with the Creek, the City has identified other areas adjacent to the waterfront, or along planned waterfront esplanades, which

¹¹⁶ *Id*

¹¹⁷ See, e.g., N.Y. City Ofc. of the Deputy Mayor for Econ. Dev’t, *Final Environmental Impact Statement for the Hunter’s Point South Rezoning and Related Actions* 1-23 (Sept. 12, 2008), available at http://www.ci.nyc.ny.us/html/oec/html/ceqr/08DME006Q_FEIS.shtml (cross-referencing applicable standards for best stormwater management practices).

will provide additional active and passive recreational opportunities.¹¹⁸ Development of open space along the waterfront raises the same issues and concerns described for construction of upland facilities. In addition, an increase in public awareness of contaminated sediments in the Creek that will result from listing Newtown Creek will raise public concerns about the impact of such contamination in neighboring communities and the safety of waterfront recreational facilities and open space. EPA will need to educate the public as to the potential pathways of exposure to Newtown Creek sediments and to reassure the public as to the safety of neighboring facilities and recreation spaces. The City believes that if EPA does not respond to these important concerns in a timely manner, it could severely impede the City's ability to move forward on community-supported commitments for improvements in and around Newtown Creek. For more information *see infra* Section IV.

4. Existing Amenities and Sensitive Subpopulations

The City has identified the following existing amenities and facilities with sensitive subpopulations (e.g., children, the elderly, or people with chronic illnesses)¹¹⁹ within one quarter mile of Newtown Creek: 12 parks or playgrounds with active and passive recreational space including two open space sites with direct access to the water,¹²⁰ two pre-kindergarten facilities, six day care or enrichment facilities, four junior high or high schools, four locations with after school programs, two colleges, one facility for treatment of people with disabilities, two senior facilities, two homeless facilities, and a correctional facility.¹²¹ The proposal to place Newtown Creek on the NPL does not necessarily require a human health advisory nor does the City have reason to believe that these facilities are unsafe because of their proximity to Creek sediment. However, the City asks EPA to recognize the existence of such amenities and sensitive subpopulations and explicitly reassure the surrounding communities as to their continued safety in light of the proposed listing.

¹¹⁸ The active recreation spaces include athletic fields and a variety of play areas that would include active equipment, water elements, and interactive and educational features. Passive recreation spaces include picnic areas and seating areas for bird-watching, scenic views, and horticultural display gardens.

¹¹⁹ U.S. Env'tl. Prot. Agency, Ofc. of Emergency and Remedial Response, *Risk Assessment Guidance for Superfund Volume I Human Health Evaluation Manual (Part A)* (Interim Final, Dec. 1989), 6-7.

¹²⁰ The Newtown Creek Nature Walk is a quarter-mile public walkway along Newtown Creek with direct primary access to the water. The Nature Walk was designed by environmental sculpture artist George Trakas and built by NYC DEP through the New York City Department of Cultural Affairs Percent for Art program in conjunction with NYC DEP's ongoing upgrade of the WPCP. The Walk borders the WPCP, and affords visitors a unique view of its settling tanks and digesters. It also features a 515-foot pathway along Whale Creek that is richly planted with trees, shrubs and other flora native to the Newtown Creek area, and several recessed seating areas that afford visitors intimate access to the surrounding waterways. NYC DEP, *The Newtown Creek Nature Walk*, available at http://www.nyc.gov/html/dep/pdf/newtown_creek_nature_walk_flyer.pdf (last visited Dec. 19, 2009).

¹²¹ Documentation on file with the Office of the Deputy Mayor for Operations.

5. Economic Analysis of a Superfund Designation

There are significant potential economic impacts associated with delays, described above, to planned investments in the area caused by an NPL listing. These impacts are apparent even from conservative projections. The New York City Economic Development Corporation ("NYC EDC") conducted an analysis of the tax impact of a Superfund designation on the area within one quarter mile radius of Newtown Creek ("Newtown Creek Corridor").¹²² Assuming that the Creek is not designated, the planned projects in the Newtown Creek Corridor alone (HPS and the adjacent privately-owned parcel as well as 17 prospective projects in CPW) will generate over \$540 million in tax revenue.¹²³ Assuming that Superfund designation moves forward and delays these projects and other real property tax collections in the area, it will cost the City between \$515 million and \$743 million in lost tax revenue depending on the length of the cleanup.¹²⁴

¹²² NYC EDC's analysis is based on conservative assumptions including:

- (i) After a final NPL listing, property tax collections in the proximity of the Creek will remain constant, and will not drop, until two years before the end of the remedial actions.
- (ii) The estimated impact on real property tax collections is based on a buffer area around the Creek of only one quarter mile. Studies of property values in the vicinity of a Superfund site detect effects on property values within at least .57 miles. See U.S. Env'tl. Prot. Agency, Ofc. of Superfund Remediation and Tech. Innovation, *Challenges in Applying Property Value Studies to Assess the Benefits of Superfund Program* (Jan. 2009), available at <http://www.epa.gov/superfund/programs/recycle/pdf/PropertyStudy.pdf>) Estimated real property tax collections in the area within one quarter mile of the Creek exclude the redevelopment sites within Hunter's Point South and Greenpoint-Williamsburg, for which property taxes are estimated separately. For the selected sample, the annual growth rate of the taxable assessed value between Fiscal Year 2001/2002 and Fiscal Year 2009/2010 is 4.19% and total collections in Fiscal Year 2009/2010 equal \$62.7 million. The growth rate of tax collections over the period considered reflects the knowledge of pollution in the Creek, the effect of recent remedial actions and the type and composition of land use and economic activity in the area.
- (iii) Under the "no-listing" scenario, development of the residential buildings at Hunter's Point South will begin in 2012 (following infrastructure construction), implying that, absent the assurances and coordination the City seeks from EPA, there could be a 6.5- to 11.5-year delay in development under the "listing" scenario depending on the length of Superfund cleanup. However, development in Greenpoint-Williamsburg under the "no-listing" scenario would not start until 2014 to account for absorption of recently constructed units. This assumption results in a 4.5- to 9.5-year delay in development due to Superfund listing without the requested intergovernmental collaboration.

¹²³ All tax estimates are net present values over 30 years with a discount rate equal to the cost of the City's long-term bonds. The tax revenues outlined above result from construction expenditures and related mortgage taxes (\$136 million); the operations of new retail establishments and property management, as well as community facility space and parking at Hunter's Point South (\$85 million); the tax impact of residential households in the area (\$310 million); and property taxes associated with the planned projects (\$106 million). The tax estimates reflect incremental revenue to the City (i.e., they are net of taxes on current property values and taxes resulting from existing operations at the project sites that would continue if not for these projects, which totals \$92 million). These tax revenues are associated with 27,329 direct and indirect/induced person-years of employment resulting from private construction spending, and 611 incremental permanent direct on-site jobs.

¹²⁴ NYC EDC analyzed two separate timelines. The first is based on an average of Superfund projects that have been completed in New York State and anticipates delisting 14.6 years after initial proposal. The second timeline is based on an average of Superfund projects that are ongoing in New York State and anticipates delisting 18.5 years after initial proposal. (See *infra* Appendix G.) The total net present value losses of \$515 million and \$743 million are inclusive of the impact on real property tax collections in the one quarter mile radius around the Creek.

These figures show that even if property values were to rebound over the long term, there would potentially be negative economic impacts for New York City from delayed improvements even under the most conservative analysis.

C. Industrial Business Activity and Employment Proximal to Newtown Creek

New York City's industrial sector is a vital part of the City's economy, directly employing over 440,000 individuals.¹²⁵ In 2006, the Bloomberg Administration designated 16 IBZs to preserve the City's most productive industrial areas, catalyze job growth, encourage capital investment, and foster a supportive business environment in key industrial areas.¹²⁶ Newtown Creek borders three such zones: the North Brooklyn, Long Island City and Maspeth IBZs. A total of approximately 1,500 businesses representing a wide variety of sectors operate within a quarter mile radius of Newtown Creek and employ nearly 34,000 individuals.¹²⁷ Roughly two thirds of these establishments operate in the industrial sector and employ nearly 26,000 people.¹²⁸ The 1,500 businesses and their employees are estimated to produce \$219 million in tax revenue to New York City in 2009, of which \$165 million is attributable to industrial businesses.¹²⁹ Several businesses routinely rely on the Creek itself for business operations, such as the receipt of raw materials via barge.¹³⁰

1. NYC's Concerns Regarding the Proposed Listing to the NPL for Local Business

The City is concerned that adding Newtown Creek to the NPL may have negative impacts on businesses along and proximal to the Creek. A listing has the potential to create a climate of uncertainty that may affect property owners along the waterfront as well as further

¹²⁵ Statistics compiled by N.Y. State Dep't of Labor based on Quarterly Census of Employment and Wages, on file with N.Y. City Econ. Dev't Corp. "Industrial sector" here includes, in whole or in part, the following sectors: manufacturing, construction, utilities, transportation, distribution and logistics, warehousing and wholesale trade.

¹²⁶ The City has committed not to rezone IBZs to permit residential uses. See N.Y. City Mayor's Ofc., "New York City Industrial Policy Protecting and Growing New York City's Industrial Job Base," available at <http://nyc.gov/html/imb/downloads/pdf/whitepaper.pdf> (Jan. 2005), 5, 15. Businesses located in the IBZs are eligible to receive free, one-on-one assistance to help them operate, expand, relocate and start within these areas. Industrial businesses located in adjacent, relatively mixed-use areas called Ombudsman Areas are also eligible for this assistance. In order to encourage an efficient clustering of complimentary industrial uses, the City offers businesses relocating to Industrial Business Zones a \$1,000-per-employee tax credit. See generally N.Y. City Mayor's Ofc. for Indus. and Mfg. Businesses, *The Benefits of Locating Within An Industrial Business Zone*, available at http://www.nyc.gov/html/imb/html/ibz/ibz_benefits.shtml (last visited Dec. 5, 2009).

¹²⁷ Statistics compiled by N.Y. State Dep't of Labor based on Quarterly Census of Employment and Wages, on file with N.Y. City Econ. Dev't Corp.

¹²⁸ See footnote Error! Bookmark not defined.5 *supra*.

¹²⁹ Tax revenue estimates are calculated using a citywide average amount of tax collections per worker. The taxes per worker estimates are calculated by NYC EDC and are derived from New York City Department of Finance data. The estimates vary by industry and are applied to the employment counts cited above. The total tax revenue estimates include business income and sales taxes as well as personal taxes associated with the employees. Real property taxes for the sites within the quarter mile-radius are not included in the estimates.

¹³⁰ U.S. Army Corps of Eng'rs, *U.S. Waterway Data: Port and Waterway Facilities*, available at <http://www.ndc.iwr.usace.army.mil/data/datapwd.htm> and <http://www.iwr.usace.army.mil/ndc/db/ports/data/portsall.txt> (last visited Oct. 8, 2009).

upland of the Creek.¹³¹ The City is concerned that such uncertainty would persist throughout the lengthy investigation and remedial phases of the Superfund process.

A specific concern is that firms may experience difficulty in obtaining financing to support continued operation or to invest in capital improvements to existing facilities. Typically, small businesses rely on local banks and small lenders to finance their capital expense projects.¹³² These local banks have successfully weathered the financial crisis because of their relative stability and risk-averse loan process.¹³³ As lending standards tighten even further in response to growing loan defaults, many small businesses are finding it difficult to obtain financing from small local banks.¹³⁴

The proposal to list Newtown Creek on the NPL may make risk-adverse public and private sector lenders unwilling to enter into financing arrangements for industrial and commercial properties along or upland of the Creek. An absence of financing may have a chilling effect on capital investment in the area, with existing businesses deferring or abandoning plans for expansion. This uncertainty could also lead to the inability of industrial firms to properly insure their businesses and property.

The financial pressures on local businesses may be further compounded by the potential for litigation related to the sources of the pollution found in the Creek. Given the expense associated with remediation, those parties that are clearly responsible have a strong incentive to enter into protracted legal battles over liability with other businesses or property owners who they believe contributed in any way to the contamination in the Creek. Many of the businesses in the vicinity of the Creek are relatively small, and any litigation has the potential to cripple these firms.¹³⁵ Small businesses may suffer greatly if a significant amount of owners' time and resources are devoted to defending themselves from such litigation. The City encourages EPA to

¹³¹ See generally Bomie H. Keen, *Tax Assessment of Contaminated Property: Tax Breaks for Polluters?*, 19 B.C. ENVTL. L. REV. 885, 898-901 (discussing appropriate consideration of "uncertainties" inherent to ownership of contaminated property in property valuation); Lorraine Lewandrowski, *Toxic Blackacre: Appraisal Techniques & Current Trends in Valuation*, 5 ALB. L.J. SCI. & TECH. 55, 57 (1994) (noting that "uncertainty" associated with Superfund sites acts as "an impediment to many necessary functions ... associated with property management and investment return... [including] alienability, insurability, and financeability of the property"); Kent D. Messer et al., *Can Stigma Explain Large Property Value Losses? The Psychology and Economics of Superfund*, ENVIRONMENTAL AND RESOURCE ECONOMICS 33:299-324 (2006) (calling for expedited cleanup and simplification of Superfund process to reduce the number of stigmatizing events that attract attention to sites so as to reduce property losses and prevent decades-long devaluation effects); Jill J. McCluskey and Gordon C. Rausser, *Stigmatized Asset Value: Is it Temporary or Permanent?* (2003), available at SSRN: <http://ssrn.com/abstract=213892> (noting long-term or possibly permanent nature of Superfund stigma).

¹³² See Michael Hough, *Rewriting bank regulations will hurt small business*, WASHINGTON EXAMINER, Nov. 23, 2009.

¹³³ Zachery Kouwe, *Small Banks Move in as Giants Falter*, N.Y. TIMES, Nov. 1, 2009.

¹³⁴ Peter S. Goodman, *Credit Tightens for Small Businesses*, N.Y. TIMES, Oct. 12, 2009.

¹³⁵ Businesses located within a quarter mile radius of the Creek had an average of 23 employees in 2008. Statistics compiled by N.Y. State Dep't of Labor based on Quarterly Census of Employment and Wages, on file with N.Y. City Econ. Dev't Corp.

quickly establish and mobilize a program that allows small businesses to protect themselves from possible litigation and liability (*e.g.*, *de minimis* settlement for appropriate properties).

In addition, the City is concerned that the investigation and remedial phases of the Superfund process have the potential to dismpt routine business operations along the Creek. This could occur due to physical dismptions, such as cessation, restriction or delay of barge traffic using the Creek for transportation purposes, or process-related dismptions such as the halting or deferment of expansion or renovation. The industry along and in the vicinity of Newtown Creek serves a vital role in preserving the local economy, retaining well-paying jobs, and securing much needed goods and services. The City requests that, in the event of Superfund designation, EPA make active efforts to avoid dismptions to the local economy during the investigation and remedial program, and the City seeks explicit assurances from EPA to this effect (*see* Section IV *infra*).

IV. Commitments the City Seeks from EPA

The City of New York fully supports a cleanup of Newtown Creek that is protective of human health and the environment, and with appropriate commitments from EPA to mitigate the potential negative impacts of a designation, could support listing the Creek on the NPL. If the Creek is listed, the City requests that EPA make an agency-wide commitment to intergovernmental collaboration¹³⁶ among Federal, State and City governmental agencies and local community and business stakeholders. A cooperative approach must include a commitment of staff and resources sufficient to enable EPA to be thoroughly responsive to community and local government needs. The City believes that EPA's Newtown Creek remedial response could be a national model for community and intergovernmental collaboration consistent with Administrator Jackson's vision.

The City requests that EPA conduct its remedial program in a manner that is supportive of the wide variety of ongoing and planned community-supported water quality improvement projects, ongoing business operations, and City initiatives in and around Newtown Creek. The interests of the City's citizens require that EPA and its staff work closely with local government and community leaders to ensure that current initiatives and projects described above are not inadvertently harmed by an NPL listing and the resulting Superfund process. The City requests a series of commitments and actions that reflect the size and density of the affected population, and the unique urban characteristics of the area affected by the proposed listing. The requested commitments and actions, including EPA's dedication of resources, its approach to remedial program management, and its overall willingness to collaborate with intergovernmental and community partners, are essential to the protection of public health and the environment, the continuity and growth of the local economy, and the vitality of communities surrounding Newtown Creek.

City Requests of EPA:

1. The City requests that EPA clearly state the geographic limits of Superfund designation for Newtown Creek, and the scope of its interest under CERCLA.
 - Spatial delineation of the designated Superfund site, and definition of EPA's interest in upland property with respect to CERCLA, particularly in the area along the East River waterfront near Newtown Creek, will enable other Federal and State agencies with permitting jurisdiction to conduct their regulatory affairs in a timely and efficient manner. It will also enable non-governmental parties to identify whether and to what extent properties in the vicinity of the East River and Newtown Creek, including

¹³⁶ See footnotes 8 and 9 *supra*.

large-scale developments in Hunter's Point South and Greenpoint-Williamsburg, are subject to EPA jurisdiction relating to the designation.¹³⁷

- The City also requests that EPA develop clear criteria to establish technical limits for EPA jurisdiction under CERCLA for upland parcels within the broader Newtown Creek watershed. For instance, defining the standards for groundwater impact below which EPA has no interest, setting distance limits from the Creek beyond which EPA has no interest, and providing site-specific technical criteria (e.g. whether groundwater flow from beneath a specific property discharges into the Creek). This information will be invaluable to land owners, developers and lenders in land transactions and industrial financing and can significantly reduce potential impacts of an NPL listing on the surrounding community.
2. The City requests that EPA fully engage pertinent divisions of City government during all stages of the Superfund process as intergovernmental partners.
- The City and EPA share a core goal for Newtown Creek, namely the execution of a prompt and thorough cleanup of contamination to levels that are protective of human health and the environment. NYC DEP and NYC OER have strong technical capacity and can partner with EPA in intergovernmental management, decision making, and oversight collaboration processes for scoping and reviewing milestone work such as the Remedial Investigation and Feasibility Study and the selection and implementation of the Remedial Action. The City therefore requests that EPA include designated City government staff, including environmental scientists, geologists and engineers, to fully participate in the remedial program to ensure that City government may continue to fully and appropriately represent the interests of impacted New Yorkers.
3. The City requests that EPA dedicate remedial program staff to provide direct and timely engagement with the City and surrounding communities to minimize the impacts of a listing on neighboring residents and businesses beginning immediately and continuing throughout the remedial program:
- The City requests that EPA minimize the impact of a listing on property owners. The City is aware of the serious concerns that the proposed Superfund designation has already caused investors, businesses and property owners with plans or current operations on upland properties in the vicinity of Newtown Creek, including: (1) the ability to obtain financing for development projects, business operations or funding

¹³⁷ The City's redevelopment plans include proposals for water dependent uses and construction in Newtown Creek and the East River. It is the City's understanding, however that the proposed listing covers only Newtown Creek and does not include segments of the East River. Consequently the City is not discussing plans proposed for the East River in these comments. The City requests that EPA confirm the City's understanding and if it is not correct, immediately amend its Federal Register proposed listing notice to make the scope of its proposed listing clear.

for industrial improvements; and, (2) the ability to obtain and maintain necessary insurance. To address these concerns, the City requests that EPA move promptly to protect entities technically classified as Potentially Responsible Parties¹³⁸ who are, in fact, not liable for the cost of the remedial action or natural resource restoration. EPA should devise a process by which owners can demonstrate that they have no CERCLA liability, obtain prompt EPA sign-off, liability release, or other such assurance, and provide evidence of this determination to funding entities, insurance companies, and/or other interested parties. Similarly, the City asks EPA for a commitment to move forward quickly on *de minimis* and/or *de micromis* settlements with owners and operators of upland sites whose contribution to the present-day contamination in the Creek is clearly negligible. Delay or failure to engage on these issues will result in uncertainty regarding potential CERCLA liability, impairment of lender financing, and loss of investor interest. It is crucial that EPA engage in innovative and collaborative ways to minimize or eliminate the negative impacts to the surrounding community.

- The City requests that EPA commit to assisting in the advancement of land transactions or financing for capital improvements, and to meeting with prospective financing parties, buyers, and tenants to instruct them in their efforts to obtain Bona Fide Purchaser status.¹³⁹
- The City requests that EPA closely coordinate with the hundreds of local businesses along the Creek to ensure that investigation and remedial activities do not negatively impact business operations, such as routine barge traffic. The Newtown Creek waterway is an active transportation route.¹⁴⁰ Any impediments to full usage of the Creek should be discussed with the City and waterfront industrial property owners, who should have an opportunity to propose alternatives and work with EPA to establish a timetable for restoring full access. In addition, the City seeks assurances

¹³⁸ Such Potentially Responsible Parties may include homeowners, residential tenants, and businesses connected to city sewers for treatment of sanitary waste only.

¹³⁹ Assurances the City seeks from EPA for the advancement of land transactions or financing for capital improvements proximal to Newtown Creek include: 1) providing written advice to prospective buyers and tenants around the Creek on specific steps that should be followed prior to taking title to real property so as to meet the All Appropriate Inquiries standard; 2) providing written assurances to prospective buyers and tenants that EPA will not pursue future enforcement action under CERCLA against such parties if those parties comply with All Appropriate Inquiries before taking title to real property or before providing financing for capital improvements on properties around the Creek; 3) reviewing All Appropriate Inquiries documents and providing letters to prospective buyers and tenants stating that EPA will not take enforcement action against individual buyers and tenants; and, 4) writing assurances to Bona Fide Purchasers and prospective financing parties (in the case of capital improvement financing) that EPA will not place a CERCLA section 107(r) "windfall lien" for unrecovered response costs on a property. See *Standards and Practices for All Appropriate Inquiries*, 70 Fed. Reg. 66070 (Env'tl. Prot. Agency, Nov. 1, 2005); 42 U.S.C. §§ 9601(40) (defining "bona fide prospective purchaser"), 9607(r)(2) (establishing windfall lien program).

¹⁴⁰ U.S. Army Corps of Eng'rs, *U.S. Waterway Data: Port and Waterway Facilities*, available at <http://www.ndc.iwr.usace.army.mil/data/datapwd.htm> and <http://www.iwr.usace.army.mil/ndc/db/ports/data/portsall.txt> (last visited Oct. 8, 2009).

that there will be no Creek-wide or upland disruption to vital New York City Department of Sanitation operations or City-contracted waste recycling and transfer vendors' facilities.

4. The City requests a commitment from EPA that it will establish a process to evaluate promptly and, where appropriate, issue approvals or assurances, related to elements of plans and work described in these comments to enable the capital improvements, open space, shoreline access, business operations, and economic development anticipated by the surrounding communities and committed to by the City, to proceed expeditiously.
 - An NPL designation should not impede timely progress of existing and future plans for improvements in the Creek and surrounding neighborhoods, including activities in or adjacent to the Creek, (e.g. direct Creek access, shoreline construction, new permitted discharges into the Creek, and bulkhead and pier repair), activities necessary to enable development of uplands proximal to the Creek (such as on-site demolition, construction, sewer and utility installation and/or remedial mitigation measures), and City and private development of upland areas, including open space and waterfront access.¹⁴¹
 - EPA should engage in expedited and cooperative decision-making on permits or other approvals issued directly by EPA¹⁴² and those issued by other agencies including but not limited to NYS DEC, the U.S. Army Corps of Engineers, NYC DEP, the New York City Department of Buildings, and the U.S. Department of Housing and Urban Development.
 - EPA should engage cooperatively and responsively with the local community where there is community need or demand for EPA involvement, comment and/or opinion. Such tasks include, but are not limited to, providing opinions on public health and safety associated with Newtown Creek and its proximity to residences, parks, schools, community facilities or other pertinent land uses.
 - The City requests that EPA continue to collaborate with the City to allow navigational dredging in Newtown Creek and Whale Creek, associated with the relocation of the East River sludge facilities, and CSO abatement work to proceed according to NYC DEP's original schedule. EPA has indicated a willingness to work with the City to identify a process, within the Superfund framework, that will

¹⁴¹ For example, if bulkheads, platforms, and/or piers cannot be maintained due to difficulties in obtaining EPA permits or approvals for in-water work, these structures may deteriorate to the point of being considered "non functional," potentially requiring that they be demolished and the shoreline scaled back to points upland of the existing bulkhead thereby reducing the amount of land available for public access and other water-dependent activity.

¹⁴² For example, activities involving disturbance of sediment and/or water in Newtown Creek or activities involving direct access to or discharges into the Creek.

accomplish this. Preliminary options include proceeding as a non-time critical removal action or as a navigational dredging operation. The City also requests that EPA provide assurances regarding the planned CSO abatement and water quality improvement projects to be performed by NYC DEP. The assurances the City seeks were set forth in a previous letter to EPA attached as Appendix H.

5. The City requests that EPA execute a Memorandum of Agreement with the State of New York and the City of New York that provides liability release for past and future volunteers who agree to perform cleanup of contaminated property under the authority of recognized State and City Brownfield Cleanup Programs.

- Pursuant to CERCLA Section 128, EPA may enter into a Memorandum of Agreement (“MOA”) with a State for a voluntary State-run Brownfield Cleanup Program where the program includes specific compliance standards.¹⁴³ Such a MOA would release property owners from CERCLA liability for sites remediated in compliance with State or City programs or for which the State or City has issued a certificate of completed remediation.¹⁴⁴ Currently, EPA has no such agreement with the State of New York or the City of New York. In its proposed designation of Newtown Creek to the NPL, EPA has not indicated whether it would honor remediation completion certificates issued by the State of New York under its Brownfield Cleanup Program and Voluntary Cleanup Program for the 28 ongoing and completed Brownfield projects located in Brooklyn and Queens within one mile of Newtown Creek.¹⁴⁵ Therefore, property owners who receive certificates of completed remediation from the New York State Brownfield Cleanup Program or the New York City Local Brownfield Cleanup Program are not released from CERCLA liability by EPA.
- Going forward, the lack of such an agreement could inhibit one of EPA’s overall goals, the cleanup of contaminated groundwater and associated discharges from upland properties into the Creek. The absence of such an agreement between EPA and the State/City could discourage developers from selecting Brownfield sites in the Newtown Creek watershed for cleanup and redevelopment because these programs would not provide the necessary shield from CERCLA liability. Since many sites around the Creek have an industrial provenance and may require remedial attention, the Superfund designation could severely depress cleanup activity, investment, and

¹⁴³ 42 U.S.C. § 9628(a)(1)-(2).

¹⁴⁴ See U.S. Env’tl. Prot. Agency, State & Tribal Response Programs Agreements, *available at* http://www.epa.gov/swerosps/bf/state_tribal/moa_mou.htm (last updated Dec. 15, 2009) (listing current Memoranda of Agreement between US EPA and State voluntary cleanup programs).

¹⁴⁵ Sites within one-mile radius identified based on data from N.Y. State Dep’t of Env’tl. Cons., Remedial Site Database, *available at* <http://www.dec.ny.gov/chemical/8437.html> (last visited Dec. 22, 2009).

subsequent community revitalization efforts that might have otherwise occurred absent an NPL designation.

6. The City requests that EPA dedicate a substantial, multidisciplinary, regional project management team to oversee Newtown Creek commensurate with the fact that the Creek, if designated to the NPL, will be one of the most densely populated Superfund sediment dredging sites in the nation.

➤ At 168 acres, Newtown Creek is a large urban site located in the heart of one of the most complex and densely populated cities in the world. The proposed Newtown Creek Superfund site would represent one of the most densely populated Superfund sediment dredging sites in the country.¹⁴⁶ With over 300,000 people living within a one mile radius, Newtown Creek's surrounding population is greater than the *total sum* of the populations of 40 of the other 66 contaminated sediment dredging sites currently managed by EPA.¹⁴⁷ Especially given the agency's concurrent proposal to add the Cowanus Canal to the NPL, EPA should allocate sufficient staff and resources to manage both projects in the manner that surrounding communities deserve. Specifically, the City requests that EPA promptly identify its proposed staffing plan for the full course of the investigation and remedial program and include the members of the multidisciplinary team that will perform the investigation, cleanup, and community outreach.

7. The City proposes a comprehensive system to address requests for EPA assistance with aforementioned issues. In the spirit of collaboration, the City proposes that EPA establish a series of Superfund Community Facilitation Committees consisting of key Federal, State, and City government agencies and community representatives to enable efficient administration of all aspects of Creek and upland management during the remedial program.

➤ Specific committees requested by the City include those to address areas that may be impacted by the Superfund designation, including a Government Permitting Committee, to facilitate acquisition of permits, such as those for bulkhead repairs and construction, wetlands and edge treatments, kayak and boat launches and get-

¹⁴⁶ Data collected and statistics calculated by the Mayor's Office of Environmental Remediation (OER) from US EPA site progress profiles and the EPA CERCLIS database (last visited Oct. 2009), *available at* <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm>; U.S. Census Bureau, 2000 Census Summary File 1, *available at* http://www2.census.gov/census_2000/datasets/Summary_File_1/ (last visited Oct.23, 2009), Table SF 1-00.

¹⁴⁷ Data collected and statistics calculated by OER from US EPA site progress profiles and the EPA CERCLIS database (last visited Oct. 2009), *available at* <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm>. The calculation of number of Superfund sediment sites with area population equaling Newtown Creek was done by summing the upper limit of each site's population range, beginning with least populated site regions and continuing until the population of Newtown Creek was reached.

downs¹⁴⁸ as well as for State Pollutant Discharge Elimination System ("SPDES") and Storm Water Pollution Prevention Plan ("SWPPP") approvals; a Property Transaction Committee, to develop processes for the efficient administration and review of development and remediation plans, property management including land transactions, lender financing and insurance related issues that arise during the multi-decade remedial program; an Industrial and Business Committee to assist local businesses with special needs (*e.g.*, *de minimis* and/or *de micromis* settlements where appropriate) and to provide a direct means for communication with the local business community; and, a Citizen Participation Committee, to ensure the most advanced and effective program for community outreach and the most transparent presentation of EPA's remedial program is being implemented.

- In preliminary meetings between the City and EPA, the City has suggested and EPA has indicated a willingness to develop and utilize such committees. Such committees would meet regularly and consist of dedicated, multidisciplinary staff from EPA, other appropriate Federal, State and City agencies, and representatives of the affected communities. Consistent communication and coordination in this manner among EPA, the City, and other regulators will enable the most advance form of intergovernmental collaboration and ensure the least detrimental impact of the NPL designation on the community, critical projects and programs and local business interests.

8. **The City requests that EPA promptly provide all necessary assistance to the Agency for Toxic Substances and Disease Registry ("ATSDR") to conduct a rigorous and expedited Public Health Assessment and that EPA begin the baseline Human Health Risk Assessment of the proposed Superfund site.**

- Due to the almost unparalleled magnitude of the impacted population of the Newtown Creek site proposed by EPA for NPL designation, it is essential that EPA and ATSDR place the highest priority on prompt performance of public health studies and information dissemination. It is important that EPA notify the City and affected communities of any risk, or confirm the absence of such risk associated with the use of existing and planned public open spaces, esplanades, nature walks, boat launches, get-downs, schools, day care centers, and other public amenities with sensitive subpopulations in proximity to the Creek. An important aspect of community outreach will be regular updates to the City and community as to the progress, design, and timeframe for completion of any necessary studies. Along these lines, the

¹⁴⁸ The City assumes that many of the items under consideration in the Government Permitting Committee would be permitted through the submission of the NYS-DEC/Army Corps of Engineers Joint Application Form. Joint Application for Permit Form, N.Y. State Dep't of Env't. Cons. and U.S. Army Corps of Eng'rs, *available at* http://www.dec.ny.gov/docs/permits_ei_operations_pdf/jointapp.pdf (last visited Dec. 11, 2009).

City requests assurances as to whether any existing amenities cannot continue to operate during the investigation and remedial program.

9. The City requests that EPA promptly initiate the remedial program and engage a comprehensive investigation to identify all historical contributions of contaminants to Creek sediment.
 - The City requests that EPA take prompt action to begin the supplemental Remedial Investigation and Feasibility Study process. As part of a rigorous Remedial Investigation, EPA should comprehensively investigate and identify all environmental impacts to Creek sediment originating from industries with ongoing or historical operation along the Creek, including entities currently under State Consent Orders or under the jurisdiction of other State or Federal programs.
 - The City requests that EPA comprehensively investigate and pursue enforcement of ongoing illegal discharges from un-permitted pipes, conveyances and groundwater into Newtown Creek. This includes discharges identified during NYS DEC upland investigations in the vicinity of Creenpoint during a study of multiple refinery oil spills, as well as information gathered during NYS DEC's investigation of sediment in areas in the Phelps Dodge and National Grid facilities.
 - The City requests that EPA consider the use of spatially defined operable units for the purpose of accomplishing the most expeditious and effective cleanup. For example, the remedial program for Newtown Creek could distinguish more highly contaminated areas in the upper reach of the designated water body from less contaminated areas near the mouth of the Creek. Furthermore, this approach could enable greater flexibility in the consideration of interim removal actions. The operable unit approach could demonstrate EPA's commitment to making Superfund work in collaboration with important community projects.
10. The City requests that EPA conduct its remedial program with the most comprehensive form of community participation.
 - Included in this effort must be regularly scheduled periodic public meetings and announcements that establish project milestones and deadlines, provide reports on site progress, and notify the public of the release of project documents for public review and comment. The City also requests the immediate initiation of a comprehensive community engagement and outreach plan. Community involvement should include the above items and the designation of a full-time EPA community liaison officer, facilitating a community advisory group, assisting interested community groups in obtaining a technical assistance grant, establishing local document repositories, creating a dedicated project website with a comprehensive library of site related documents, producing and disseminating updated information regarding public health

and environmental safety for activities along the waterfront and proximal to the Creek, and sending frequent mailings to the community and stakeholders with Site related updates.

Conclusion

The City values this opportunity to comment on EPA's proposed designation of Newtown Creek to the NPL. Furthermore, the City appreciates EPA's grant of an additional 30 days to the initial comment period.¹⁴⁹ Without question, the City shares EPA's goal of a prompt and comprehensive remediation of contaminated Creek sediment that is protective of human health and the environment. In considering EPA's proposal for Newtown Creek, the City has thoroughly reviewed planned public improvement projects and land use amenities committed to residents and business owners in the surrounding communities. The City requests that, should the site be designated, EPA achieve remedial goals utilizing the most ambitious national model of intergovernmental and community collaboration throughout the process in order to prevent unnecessary impacts to stakeholders including the burden of delays, restrictions, disinvestment, financial hardship and wasted capital. The City seeks comprehensive written commitments (see *supra* Section IV) from EPA that it will meet the shared expectations of the City and affected communities for a full and transparent process; moving forward with investigation and remedial tasks while at the same time effectively engaging stakeholders to enable continued progress on the wide range of City projects and initiatives in and proximal to Newtown Creek.

Although contamination is varied throughout the Creek and further investigation is required to fully define its nature and extent, it is well known that the contamination of Newtown Creek is largely a result of the long industrial activity around the Creek including oil refineries and leaking oil storage facilities, copper and ore smelting plants, and manufactured gas plants among others. The City believes that imposition of the Superfund remedial program must first and foremost be accompanied by EPA's appointment of a full-time, dedicated, multidisciplinary regional project management team that is staffed in proportion to the enormity and importance of the project and the large number of impacted New Yorkers that live proximal to the Creek.

¹⁴⁹ Letter from Douglas Ammon, Chief, Site Assessment and Remedy Decisions Branch, Ofc. of Superfund Remediation and Tech. Innovation, U.S. Env'tl. Prot. Agency, to Amanda C. Goad, Asst. Corp. Counsel, Env'tl. Law Div., N.Y. City Law Dep't (Oct. 8, 2009).

List of Acronyms

Acronym	Definition
ATSDR	Agency for Toxic Substances and Disease Registry
BCP	Brownfield Gleanup Program
CEQR	City Environmental Quality Review
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CSO	Combined Sewer Overflow
CWA	Clean Water Act
DO	Dissolved Oxygen
EPA	United States Environmental Protection Agency
FHA	Federal Housing Administration
GPW	Greenpoint-Williamsburg Land Use and Waterfront Plan
HPS	Hunter's Point South Plan
HRS	Hazard Ranking System
HUD	U.S. Department of Housing and Urban Development
IBZ	Industrial Business Zone
IRM	Interim Remedial Measure
MG	Million Gallons
MGP	Manufactured Gas Plant
MOA	Memorandum of Agreement
NPL	National Priorities List
NYC DCP	New York City Department of City Planning
NYC DEP	New York City Department of Environmental Protection
NYC DPR	New York City Department of Parks and Recreation
NYC EDC	New York City Economic Development Corporation

NYC HPD	New York City Department of Housing Preservation and Development
NYC OER	New York City Mayor's Office of Environmental Remediation
NYS DEC	New York State Department of Environmental Conservation
PCB	Polychlorinated biphenyl
PRP	Potentially Responsible Party
RCRA	Resource Conservation and Recovery Act
SPDES	State Pollutant Discharge Elimination System
SSAP	Sediment Sampling and Analysis Plan
SVOC	Semi-Volatile Organic Compound
SWPPP	Storm Water Pollution Prevention Plan
USPS	United States Postal Service
VOC	Volatile Organic Compound
WPCP	Water Pollution Control Plant
WWTP	Waste Water Treatment Plant

Appendices

Appendix A

A. Letter from NYS DEC Commissioner Grannis to EPA Requesting Newtown Creek be Nominated to the NPL

JAN-23-2009 09:14

P.02



DAVID A. PATERSON
GOVERNOR

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233-1010

ALEXANDER B. GRANNIS
COMMISSIONER

Mr. Alan Steinberg
Regional Administrator
United States Environmental Protection Agency
Region 2
290 Broadway - 20th Floor
New York, New York 10007-1866

JAN 20 2009

Dear Mr. Steinberg:

Under authority delegated by the Governor of New York in 1995 to the Commissioner of the New York State Department of Environmental Conservation, I am requesting that Newtown Creek and its tributaries be nominated to the National Priorities List. The Newtown Creek system is an urban, estuarine water body that forms a portion of the boundary between the boroughs of Brooklyn and Queens in New York City, New York.

It is our understanding that the Pre-Remedial Section - Special Projects Branch - of the Emergency and Remedial Response Division of the United States Environmental Protection Agency (USEPA) in Region 2 has initiated an investigation and hazard ranking system scoring effort at the Newtown Creek.

Additionally, over the last 15 months, the New York State Department of Environmental Conservation, the New York State Office of the Attorney General, and several responsible parties have cooperatively developed a comprehensive Remedial Investigation and Feasibility Study work plan for the entire Newtown Creek system. The multi-phase, multi-year investigation plan includes all appropriate environmental media, such as waste, surface water, sediment, soils, groundwater, porewater, seepage water, sewer discharges and outflows, ambient air, flora, and fauna. Consistent with applicable statutes and regulations, the investigation would propose remedial alternatives to mitigate the impacts to the public health and environment from contamination in the creek, to the extent practicable. Staff from the U.S. Fish & Wildlife Service, the National Oceanographic and Atmospheric Administration, and the New York State Department of Health have provided input to the plan. USEPA staff have also been briefed on the plan. It is strongly suggested that this plan be considered in any future actions USEPA may have for the creek.

If you or your staff would like to discuss this site further, please contact Mr. Dale Desnoyers at (518) 402-9706.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Grannis".

Alexander B. Grannis

JAN-23-2009 09:00

TOTAL P.02
P.02

Appendix B

B. Comments the City Submits in Response to the Newtown Creek Work Plan Prepared by the Newtown Creek Croup



**MAYOR'S OFFICE OF OPERATIONS
OFFICE OF ENVIRONMENTAL REMEDIATION**
253 Broadway - 14th Floor
New York, New York 10007

Daniel C. Walsh, Ph.D.
Director
Tel: (212) 788-8841
Fax: (212) 788-2941

December 23, 2009

Walter Mugdan
Region II Director
U.S. Environmental Protection Agency
290 Broadway
New York, NY 10007

Re: Comments Submitted by New York City on the Creekwide Remedial Investigation/Feasibility Study Work Plan for Newtown Creek, Prepared for the Newtown Creek Croup on March 2008

Dear Mr. Mugdan:

This letter memorializes the City's preliminary technical assessment of the Work Plan for a Remedial Investigation ("RI") and Feasibility Study ("FS") of Newtown Creek prepared for the Newtown Creek Croup in March 2008 ("Work Plan") and provided to the City by EPA. In his letter, dated January 20, 2009, recommending Newtown Creek for EPA's consideration, New York State Department of Environmental Conservation's Commissioner "strongly suggested that this plan be considered in any future actions USEPA may have for the creek."¹ While the Work Plan proposes a useful base of investigation, substantial amendment is required to establish a balanced and comprehensive baseline for performance of an RI to support a FS and remedy selection for Newtown Creek ("Creek"). In particular, the Conceptual Site Model ("CSM") used in the Work Plan addresses only a subset of current potential discharges to the surface water and sediment ("Creek System")—namely, municipal sources—and fails to appropriately incorporate

¹ Letter from Alexander B. Grannis, Commissioner of the New York State Department of Environmental Conservation to Alan Steinberg, Regional Administrator, United States Environmental Protection Agency (re: Docket No. EPA-HQ-SFUND-2009-0588-004)

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any past or current contaminant discharges from industries or industrial properties in the vicinity of the Creek.

It should be noted that the members of the Newtown Creek Croup (Exxon-Mobil, Texaco-Chevron, British Petroleum, Phelps Dodge and National Grid) are heavily funded and have a strong self interest in attempting to establish that they do not have liability under CERCLA for sediment contamination in Newtown Creek. As is clear in the submitted Work Plan, this group is attempting to place CERCLA liability solely on other parties, namely the municipality and the City's taxpayers. EPA must be aware of the self-serving objectives of these industrial polluters and safeguard the remedial program from this inappropriate influence.

To address the serious deficiencies in the Work Plan, existing information and data relevant to: (1) historical activities and industrial processes on the Newtown Creek uplands, and (2) the nature and extent of contaminant enclaves in the Creek System should be used to rebuild the CSM. EPA has made it clear that its approach to the Creek will be consistent with its approach to Cowanus Canal: focused on addressing contaminated creek-bed sediment and identifying and ceasing any ongoing contaminated uplands discharges to the Creek. In a follow-up technical review session, EPA indicated that while Combined Sewer Overflows ("CSOs") and Storm Sewer Overflows ("SSOs") discharges could be contributing factors to the Creek's current condition, they are very likely not germane to a potential cleanup of Newtown Creek. As such, the proposed Work Plan must encompass additional aspects that will be relevant and contribute to the remedial program, including a substantial expansion of the scope of investigation within the Creek as well as upland source areas.

Although the current Work Plan suggests that some of this scope deficiency could be addressed in a planned "Phase II" investigation to address gaps revealed in Phase I, many of those gaps are evident now and should be addressed immediately. As currently designed, Phase I cannot thoroughly identify nor ultimately address additional data gaps that must be filled to achieve a comprehensive characterization of the Creek. Moreover, a two-phase approach and other artifacts of the original Work Plan's development, which were reported to be responsive to DEC's initial request for speed in the 2007 draft of the plan, are no longer relevant. Therefore, the two-phased Work Plan approach should be abandoned, so as to better advance the goal of cleaning the Creek.

The current Work Plan must incorporate the following changes to establish an appropriate baseline for an RI/FS and ultimate remedy selection:

- I. Substantial and targeted addition to the scope of proposed field work and research. A broader scope of work is needed to characterize: the nature and extent of ongoing discharges of contaminants from upland industrial properties to the Creek; the fate and transport of historical discharges of contaminants to the Creek from all sources, including industries; and to provide for a baseline human health risk assessment ("HHRA").

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- II. Removal of work scope elements that do not advance the goals of RI/FS. Certain work scope elements should be removed because, in their present form, they are improperly designed and will not provide data or information that advance the goals of the RI or FS for the Creek, including the overweighting of routine CSO and SSO discharges, and other artifacts of the original DEC program structure. Further, the air quality monitoring program is poorly designed and is not capable of assessing impacts from the Creek.
- III. Conceptual Site Model. Fundamental changes are needed to render the CSM accurate and complete. The CSM, as described in the Work Plan, focuses solely on current municipal sources potentially discharging contaminants to Creek System. The CSM does not recognize historical sources of contaminants, particularly from industrial operations along the shoreline and in the watershed, nor does it reflect the extensive base of environmental data already generated for the Creek System and adjacent upland properties. The existing data demonstrates clear patterns in contaminant fate, particularly in Creek sediments.
- IV. Complete modification of the Work Plan's textual overlay. Complete modification of the textual overlay of the document is necessary to provide a balanced and comprehensive representation of the Creek System, to eliminate the sole emphasis on potential municipal sources, and to fairly represent all historical, current, and potential contaminant sources.

Each of these elements is described in greater detail below.

I. SUBSTANTIAL AND TARGETED ADDITION TO THE SCOPE OF PROPOSED FIELD WORK AND RESEARCH

The Work Plan purports to present a scope of work sufficient to satisfy the requirements to complete an RI/FS for Newtown Creek (e.g. page 1-1 and page 5-1). To achieve this goal, however, the RI must be capable of generating data sufficient to complete the FS and support the selection of a remedy. As currently designed, the Work Plan does not meet this standard.

A. Upland Contaminant Sources

As noted above, identification of upland discharges of contamination to the Creek System is a critical component of any Creek-wide investigation. The Work Plan makes no proposal for actual field investigation of groundwater discharges from upland industrial properties. On page 3-3, for example, the Work Plan only proposes the evaluation of existing data on upland sources during Phase I, but identifies no actual reports or data sources for this evaluation (as discussed elsewhere in these comments), nor is there any indication that existing reports or data sources are sufficient for such purposes. Phase II of the Work Plan proposes to fill data gaps found in Phase

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I. As noted at the outset, there is no indication that any data gaps can be identified using the scope of work currently proposed for Phase I. Further, the Work Plan for Phase II makes no specific commitment to perform any groundwater field work to assess upland contamination discharge. Rather, on page 3-3, it merely commits to "... evaluating approaches for the collection of groundwater data" to fill data gaps that may be identified.

Overall, the Work Plan is incomplete and highly biased in its representation of the occurrence of contaminants in the Creek System, and it is inconsistent with the findings of past investigations. In a discussion of the nature and extent of contaminants of concern in sediments in the Creek System, the Work Plan repeatedly emphasizes polycyclic aromatic hydrocarbon ("PAH") compounds, which it generally attributes to CSO and SSO discharges. There is no discussion of the lateral and vertical distribution of other contaminants. For example, there is no discussion of the concentration distribution of total petroleum hydrocarbons, which can be directly attributed to petroleum industrial activity on the Creek and exceeds 10% in sediment in various depositional locations within the Creek System. Other examples include concentrations of copper, which according to past reports exceeds 3% of total sediment mass in sediments along the bulkhead line of the Laurel Hill facility, an area of historical copper ore unloading. This finding illustrates the role that contaminated material spills, which occurred during historic industrial activities, have played in the development of the current contamination profile of the Creek System. However, this existing data and evaluations of pathways for contaminant discharge from industrial operations on the Creek are absent from the Work Plan.

The Work Plan proposes some effort to reconstruct sources of contamination in the Creek System during Phase I. For instance, page 3-2 of the Work Plan discusses what the Newtown Creek Croup has characterized as mostly municipal sources, including CSOs, fill activity, and storm sewers. While there is a reference to "landside groundwater impacts," the list of data sources identified for review in the plan (presented in Appendix B) does not include a single report of groundwater contamination from landside industrial activity. Yet there are numerous examples of such reports readily available for review—indeed, many have been produced by members of the Newtown Creek Croup and documents substantial contamination that they have caused. Moreover, almost all of the reports identified in Appendix B that present actual data and information on Newtown Creek describe potential municipal sources (*i.e.*, CSO and SSO reports). On page 3-3, the Work Plan indicates that data gaps identified in Phase I will be filled in Phase II. However, without sufficient scope for the investigation in Phase I, it is evident that there will be no data gaps identified for the upland groundwater contamination discharges from known industry, and thus no additional work will be completed in this critical area in the contemplated Phase II.

This clear bias in development of the Work Plan, if left uncorrected by EPA, will delay the performance of a representative Remedial Investigation and cleanup of the Creek, or worse, will bias the results of the Remedial Investigation and achieve the goal of shifting responsibility for cleanup from industrial polluters to the citizens of NYC.

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To address these deficiencies, the Work Plan should be modified to:

- Provide an appropriate evaluation of likely pollutant discharge pathways and a plan of investigation of contaminant discharge to the Creek System from all past contaminant sources, including upland industrial sources;
- Develop a plan of investigation to identify and investigate historic industrial processes and the role that these processes may play in contaminant distribution, including but not limited to: materials loading and unloading, transport, and disposal activity and direct waste discharge to the Creek;
- Summarize the historic use of adjacent land and present known historical land use data;
- Summarize all upland industrial properties with documented discharges to the environment and potential discharges to the Creek System, including the properties of those parties within the Newtown Creek Croup;
- Identify all historical technical environmental reports for upland industrial sites with known environmental discharges and include these documents in the document table in Appendix B that identifies sources to be used in subsequent review;
- Identify all relevant existing studies of upland contamination of land and groundwater from environmental regulatory programs, including all sites managed by DEC;
- Position additional sediment cores along the bulkhead lines of critical industrial areas where the history of operation indicates that loading and unloading operations occurred;
- Evaluate all industrial land properties and propose field work, including the installation and sampling of groundwater monitor wells, to investigate these land parcels for discharges of contaminants to the Creek System; and
- Include plans to perform fingerprint-type investigations, including geochemical ratios, to aid in the identification of source responsibility from industrial properties.

B. Insufficient Emphasis on Contaminant Profiles

There is no discussion of the effect that historic discharges from industrial sources have had, and may continue to have, on the sediments in the Creek. There is ample data from earlier reports on contaminant abundance as a function of depth in the sediments of Newtown Creek. This data shows, produced using age-dating isotopes of beryllium, lead, and cesium, a profound increase in concentration of contaminants with depth. The highest concentrations correspond

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with sediments deposited in the first half of the 20th century during the period of peak industrial activity and industrial discharges to the Creek System. The Work Plan reports, on page 2-8, that observations from Laurel Hill investigations (OU-6) were used in the development of the proposed Work Plan scope. Although this report is appropriate for this purpose, with the proper data and associated evaluations, there is virtually no discussion of any of its valuable findings in the Work Plan itself, nor is there consideration of the implications of these findings on the CSM, the scope of work for the Work Plan, or the FS. In fact, the only citation in the entire plan on the sediment contaminant distribution with depth (at page A-4 of Appendix A), suggests that contaminants are "... nearly uniform concentration with depth." This simplistic summary of existing data is blatantly incorrect, highly misleading and must be addressed.

A comparison of contaminant concentration and depth findings is essential to the development of the CSM, Work Plan, and FS. Without an examination of contaminant concentrations as a function of depth, the Work Plan emphasizes shallow sediment and proposes a grossly insufficient number of sediment samples at depth. Such samples are essential to identify and delineate contaminant distributions at depth in the Creek sediments and, ultimately, to yield data sufficient to make informed decisions about the final remedy for the Creek sediments. Without proper sediment data, the FS and the Record of Decision ("ROD") could lead to a worsened condition in the Creek System rather than an improvement.

To address these deficiencies, the Work Plan should be modified to:

- Identify the actual pattern of occurrence of contaminants with respect to depth and present example profiles, as presented in the Laurel Hill draft RI report;
- Identify the significance of the spatial patterns of sediment contamination, including vertical and horizontal distribution and their relationship to past activities that have caused these patterns of contamination;
- Include a greater number of deep sediment core profiles to create a higher density of deep sampling in the Creek System. Deep sampling density should be increased by a factor of two or three;
- Include a greater number of radioisotope age-dating of core profiles. Radioisotope sampling density should be increased by a factor of four;
- Include baseline data tables with concentrations for all data for all contaminants that have been measured in valid prior investigations of Newtown Creek, including the Laurel Hill draft RI;
- Include maps (in plan view) and geologic cross-sections that show the lateral and vertical distribution of contaminants beneath Newtown Creek based on valid prior

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investigations. Provide descriptive text to explain findings and provide a basis for proposed work; and

- Include baseline geologic cross-sections showing data from prior investigations in the Creek and on land in the vicinity of the Creek illustrating the thickness and distribution of sediments beneath the Creek and stratigraphy of underlying geologic units.

C. Integration of RI with ongoing and completed regulatory upland cleanup programs

The Work Plan does not consider how the work performed under the Work Plan would be integrated with past and ongoing regulatory programs, such as environmental remedial programs for upland contamination sites administered by DEC.

To address these deficiencies, the Work Plan should be modified to:

- Provide a mechanism to bridge the information from upland environmental investigations that have been performed under DEC remedial programs with the information and data generated directly under the RI Work Plan; and
- Identify data gaps in existing regulatory programs for investigation of upland sites, including industrial sites, with respect to Superfund requirements for the Creek System and establish the necessary scope of field investigations to fill these data gaps.

D. Hydrodynamics

The RI Plan proposes hydrodynamic models of the Creek that integrate potential municipal sources, such as CSOs, but does not also propose hydrodynamic modeling of upland sources.

To address this deficiency, the Work Plan should be modified to:

- Perform groundwater flow modeling of land areas that incorporates fate and transport of contaminants derived from known and identified upland industrial and other sources with potential contaminant discharges to the Creek System.

E. Standards, Criteria, and Guidance

The Work Plan does not include the standards, criteria, and guidance ("SCCs") that will be used for purposes of evaluating characteristics of contamination identified in the RI and does not indicate how these thresholds will be used to judge sampling results.

To address this deficiency, the Work Plan should be modified to:

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- Incorporate SCCs that will be used in the RI/FS process, such as those published by EPA and DEC to guide a Federal or State Superfund cleanup of contaminated sediments.

F. Human Health Risk Assessment

The Work Plan does not include a plan for a HHRA, which is required to identify the potential routes of contaminant exposure to proximal populations and quantify the associated health risk.

To address this deficiency, the Work Plan should be modified to:

- Include a plan for performance of an HHRA that would analyze potential pathways of contaminant exposure from the Creek, such as surface water, sediment, and air quality. The data would be used to evaluate the baseline risk to populations and as a comparison for risk evaluation for any potential future remedial action.

II. CURTAILMENT AND REMOVAL OF WORK SCOPE ELEMENTS THAT DO NOT ADVANCE THE GOALS OF RI/FS

In light of EPA's stated goals and approach to Newtown Creek, the Work Plan, with respect to CSOs and SSOs should be significantly modified to reflect its likely contribution to Creek contaminants.

A. Combined Sewer Overflows

EPA has indicated that in its view current ongoing inputs of dilute sewage and storm runoff via combined sewer overflow are not significant factors in the assessment of remedial options and selection of a final remedy. The current Work Plan, however, appears to conclude on page 3-12 that CSOs and SSOs "... represent an important continuing source to the Creek environment." No data is presented to support this conclusion.² While this statement may not be intended as a conclusion that the City's CSOs are primarily responsible for the Creek's current conditions, it demonstrates the current Work Plan's strong bias toward municipal contributions to the Creek environment, despite the fact that those contributions are not likely, in EPA's view, to play a significant role in future decisions on the remediation of the Creek.

To address this deficiency, the Work Plan should be modified to:

² Note that the proposed sampling at CSO discharge points as proposed is also problematic. There is currently no methodology for using technology to get meaningful data from CSO events as they occur. If sampling after a CSO event is to remain in the Work Plan, DEP would need to review and approve a protocol for such sampling.

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- Reduce sampling of CSOs and SSOs in accordance with field investigations appropriate to assess the potential for illegal discharges into the Creek System, including those that might occur at all point source discharges.

B. Air Quality

The Work Plan indicates, on page 4-1, that the air quality data will be utilized "... to evaluate if Creek sediments and surface water have an incremental impact on the concentration of ... constituents in ambient air." The proposed field work is not capable of achieving the goals set out in the Work Plan. The Work Plan proposes field sampling to evaluate the contribution of the Creek System to degradation of ambient air quality by comparing upwind and downwind sample results. However, downwind samples are likely to pick up airborne contaminants liberated from mobile and other localized pollution sources from within the project area that are unrelated to the Creek System (*i.e.* from traffic on the Long Island Expressway).

The Work Plan should be modified to:

- Propose air quality work that provides a proper scientific context for data collection that is capable of achieving program goals.

III. CONCEPTUAL SITE MODEL

The Work Plan suggests that elements of the CSM will be revised based on the data obtained under the Work Plan (*e.g.* page 2-7; page 4-1). For reasons defined in these comments, the data obtained through the current Work Plan will be insufficient to develop an accurate CSM, and may lead to selection of an inappropriate remedy for the Creek System.

The CSM is incomplete for, but not limited to, the following reasons: (1) the CSM omits consideration of historical inputs of contaminants to the Creek System predominantly examines current conditions and discharges; (2) the CSM does not consider processes that occurred in conjunction with upland industrial activities that could reasonably be expected to produce a contaminant signature or hotspots in the Creek sediments (an example is raw material loading and unloading along the bulkhead with spills affecting local sediment); (3) the CSM fails to incorporate existing geochronological and geochemical data that show, throughout the Creek, a profound impact of past industrial activity on sediment contaminant levels during the period of highest industrial activity; (4) the CSM omits ongoing discharges from upland properties and in the process, emphasizes only discharges from identified municipal sources; and (5) the CSM fails to consider existing data that supports industry-specific impacts, such as high metals in the vicinity of specific industrial properties, and high total petroleum hydrocarbons (*i.e.*, in excess of 10% in some places) in sediments throughout the Creek.

To address these deficiencies, the existing CSM should be thoroughly revised to:

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- Make it complete and consistent with current knowledge of the Creek System, and to provide for the changes proposed in these comments.

IV. COMPLETE MODIFICATION OF THE TEXTUAL OVERLAY OF THE WORK PLAN

In summary, the textual component of the Work Plan is incomplete and biased, consistently and repeatedly citing and calling-out potential municipal sources of contamination to the Creek System, while excluding other potential sources, including industrial sources attributable to members of the Newtown Croup. One of many examples of imbalance in the text overlay of this Work Plan occurs on page 2-2. In discussing the emergence of sewer systems in the region of Newtown Creek, the Work Plan concludes that the city ran sewer lines to the Creek in the mid-1800s "... against the advice of the city surveyor." Setting aside the fact that Queens and Brooklyn did not become part of New York City until 1898, this passage is just one of many instances where the Work Plan characterizes the City as the sole identified responsible party, and in this case, to impute some malfeasance to the City's past actions with respect to Newtown Creek. Meanwhile the report makes no mention of the abundant historical records contemporaneous with the emergence and proliferation of industrial activity on the Creek in the late 19th and early 20th century that highlight the use of the Creek by local industry for direct discharge of liquid industrial waste products. Indeed, one of the reasons that the Creek became one of the most industrialized areas on earth by the 1920's was because private industry could easily dispose its liquid wastes into the Creek without treatment. Another example is the summary of the RI field effort to identify of upland sources of contaminant discharge to the Creek on page 4-3; the report mainly highlights potential municipal sources "(e.g., outfalls, seeps, CSOs and SSOs)."

To address these deficiencies, the Work Plan should be modified to:

- Completely revise the textual overlay of the Work Plan to make it complete, fair and unbiased. In particular, the textual overlay should include a full account of all potential sources of contamination to Newtown Creek, a representative account of all known and available data on such sources of contamination, and should reflect the major points discussed in Sections I through III above.

While the deficiencies described above are substantial, the proposed solutions can be implemented with dedicated effort.

Sincerely,



Daniel C. Walsh

Appendix C

C. Newtown Creek Ownership Memorandum

Lisa Bova-Hiatt
phone: (212) 788-0705
fax: (212) 788-0450
email: lbova@law.nyc.gov

MEMORANDUM

TO: CAS HOLLOWAY
JOHANNA GREENBAUM

FROM: LISA BOVA-HIATT

DATE: OCTOBER 20, 2009

SUBJECT: OWNERSHIP OF NEWTOWN CREEK

INTRODUCTION

You asked the Law Department to research the ownership of Newtown Creek. Our review concludes that the majority of Newton Creek ("Creek") is owned by the State of New York ("State"), although some portions of the Creek were granted by the State to private individuals and corporations, as set forth on the attached State water grant index map. The balance of Newton Creek, within the general boundaries of Meeker Avenue and the vicinity of Metropolitan Avenue, is owned by the United States of America. The City of New York

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("City") owns a small portion of the Creek between Meeker Avenue and the former Hobson Avenue.¹

BACKGROUND

Newtown Creek, a tributary of the East River, was a boundary stream between the colonial towns of Bushwick and Newton. It is now a boundary between the Boroughs of Brooklyn and Queens. When the Crown issued charters to the towns of Bushwick and Newtown, neither was granted title to the lands under the waters of Newtown Creek. Thus, after the Revolutionary War, title to the land under the waters of Newtown Creek devolved from the Crown to the State (except where already granted).

GRANT FROM THE STATE TO THE CITY

Pursuant to the Laws of 1919 Chapter 513, the New York State Legislature authorized cooperation between the State and the City to work together, along with the Federal government, to renovate Newtown Creek. The Commissioners of the New York State Land Office were authorized to convey the lands under the waters of Newtown Creek to the City.

Pursuant to the Laws of 1924 Chapter 89, the area to be granted by the State to the City was redefined and the transfer of these lands was enabled. The defined area extended from Meeker Avenue (Brooklyn) and Laurel Hill Boulevard (Queens) southerly to a line 50 feet north of Metropohtan Avenue. By Letters Patent dated June 6, 1925, recorded July 1, 1925, in Queens

¹ Hobson Avenue ran parallel to Meeker Avenue and became known as 43rd Street, which is now closed.

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County, Liber 2760 of conveyances page 2, the State quit-claimed its interest in the subject area to the City.

GRANT FROM THE CITY TO THE U.S.A.

Pursuant to (former) Charter sections 218-a and 971-a, the City was authorized to make grants of land to the United States of America for the improvement of navigation, upon the authorization by the Commissioners of the Sinking Fund. In 1929, (Cal. No. 32) the Commissioners of the Sinking Fund authorized a grant to the United States of America of most of the lands under the waters of Newtown Creek, which the City had received from the State. The City conveyed the portion of Newtown Creek extending from the vicinity of Hobson Avenue (on the north) southerly to a line 50 feet north of Metropolitan Avenue to the United States of America and retained the northerly area of the Creek between Meeker Avenue and former Hobson Avenue.

Separate recordings of the deed facilitating the transfer of this property from the City to the United States of America were made in Queens (Deed L. 3330, p. 65, recorded 08/23/1929) and Brooklyn (Deed L. 5063 p. 536, recorded 10/07/1929). Based upon our findings, the United States of America has not divested itself of its interest in the Creek.

Please find copies of the laws and the deeds referred to in this memorandum attached.

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Letters Patent from State to City of N.Y.

58698

L 2760 Cp 2

THIS PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD, FREEDOM AND INDEPENDENT, TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING: KNOW YE, THAT in accordance with the provisions of Chapter 89 of the laws of 1924, and pursuant to a resolution of the Commissioners of the Land Office adopted November 20, 1924, we hereby convey unto THE CITY OF NEW YORK, in the State of New York, all the right, title and interest of the State of New York, in and to all the lands and lands under water in Newtown Creek from Lecker Avenue and Laurel Hill Boulevard, to its southerly terminus at a point about fifty feet north of Metropolitan Avenue, including Maspeth Creek from its easterly terminus at a point about five hundred feet east of Berlin Avenue to Newtown Creek and including Muesel Island and the surrounding shoals, as more particularly described as follows:

ALL those tracts or parcels of land under the waters of Newtown and Maspeth Creeks in the Counties of Kings and Queens, City and State of New York, bounded and described as follows:- BEGINNING at the intersection of the generally westerly high water line of Newtown Creek and the southerly line of Lecker Avenue in the Borough of Brooklyn, and running thence southerly bounded by said westerly high water line of Newtown Creek and crossing the mouth of English Kill to a pierhead and bulkhead line lying fifty feet northerly of the northerly line of Metropolitan Avenue which was approved by the Secretary of War January 21, 1920; thence running easterly along said pierhead and bulkhead line to the generally easterly high water line of Newtown Creek; thence, northerly along said easterly high water line of Newtown Creek and crossing Maspeth Creek to the intersection of said easterly high water line of Newtown Creek and the southerly line of Laurel Hill Boulevard in the Borough of Queens; thence, westerly crossing Newtown Creek to the point or place of beginning, excepting from the foregoing all of the lands under the waters of Newtown Creek which have heretofore been granted by the State of New York.

ALSO, beginning at the intersection of the southerly high water line of Maspeth Creek and the easterly pierhead and bulkhead line approved by the Secretary of War January 21, 1920, which intersection is about five hundred feet easterly of Berlin Avenue in the Borough of Queens; thence, running westerly along said southerly high water line to Newtown Creek; thence, northerly along Newtown Creek to the northerly high water line of Maspeth Creek; thence easterly along said northerly high water line to the intersection of said northerly high water line and the prolongation northerly of the aforesaid pierhead and bulkhead line; thence, southerly along said pierhead and bulkhead line and its prolongation to the point or place of beginning, excepting from the foregoing all the lands under the waters of Maspeth Creek which have heretofore been granted by the State of New York. Together with all of Muesel Island and the surrounding shoals. IN TESTIMONY WHEREOF, we have caused these our letters to be made Patent, and the Great Seal of our said State to be hereunto affixed.

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3

WITNESS, FLORENCE M. S. KNAPP, Secretary of State of our said State at our City of Albany, the sixteenth day of June, in the year of our Lord, one thousand nine hundred and twenty-five.

(STATE SEAL)

FLORENCE M. S. KNAPP (--)

PASSED THE SECRETARY'S OFFICE the 16th day of June, 1925.

MARK STERN,

Second Deputy Secretary of State.

STATE OF NEW YORK, OFFICE OF THE SECRETARY OF STATE, SS.: I hereby certify that the foregoing patent is issued pursuant to a resolution of the Commissioners of the Land Office, adopted November 20, 1924. WITNESS my hand and the seal of Office of the Secretary of State, at the City of Albany, this sixteenth day of June, 1925.

(STATE SEAL)

MARK STERN,

Second Deputy Secretary of State.

The land affected by the within instrument lies in Section 4, in Blocks 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, Section 5, Blocks 1920, 1991, 1992, 1993, on the Lana Map of the County of Queens. Recorded July 1st, 1925, at 11.12 A. M., at the request of V. S. Henderson, 32 Union Hall St., Jamaica, N. Y.

COMPARED

James A. Quinn

68697 7.50 U. S. 1. 1. 1. CANCELLED.

THIS INSTRUMENT, made the twenty-ninth day of June, in the year one thousand nine hundred and twenty-five, between JOHN P. BIRNIE and ANNA A. BIRNIE, his wife, of Richmond Hill, Borough of Queens, New York City, parties of the first part, and HANRIET E. TOLPKIND, residing at No. 50 Patchen Avenue, Brooklyn, New York, party of the second part: WITNESSETH, that the said parties of the first part, in consideration of the sum of TEN (\$10.00) Dollars, lawful money of the United States, and other valuable consideration, paid by the party of the second part, do hereby grant and release unto the said party of the second part, her heirs and assigns forever,

ALL that plot or land with the building and improvements thereon, in the Borough of Queens, County of Queens, City and State of New York, bounded and described as follows: BEGINNING at a point on the northerly side of 90th Avenue, formerly Canonbury Road, distant one hundred and eighty-four and ten one-hundredths (104.10) feet westerly from the corner formed by the intersection of the Northerly side of Canonbury and the westerly side of 176th Street (formerly Homer Lee Avenue) running thence northerly at right angles to Canonbury Road one hundred (100) feet; thence westerly, parallel with Canonbury Road thirty (30) feet; thence southerly, again at right angles to Canonbury one hundred (100) feet to the northerly side of Canonbury Road and thence easterly, along the northerly

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Deed from City of NY to USA

L3330-65 (bp)

43967

THIS INSTRUMENT, made the 10 day of June, one thousand nine hundred and twenty nine, between THE CITY OF NEW YORK, a corporate municipal corporation, party of the first part, and THE UNITED STATES OF AMERICA, party of the second part, WITNESSETH: that whereas, on the 11th day of January 1925, the BOARD OF COMMISSIONERS OF THE SINKING FUND OF THE CITY OF NEW YORK, duly adopted a resolution which reads as follows: "RESOLVED, THAT, pursuant to the provisions of Sections 215-A and 271-A of the Greater New York Charter, as added thereto by Chapter 434 of the laws of 1915, and Chapter 422, of the laws of 1915, respectively the BOARD OF COMMISSIONERS OF THE SINKING FUND hereby cedes to the UNITED STATES OF AMERICA, free of cost, all the estate, right title and interest of The City of New York, in and to lands and lands under water acquired or owned by The City of New York, required for the improvement of navigation, within the bulkhead lines of Newtown Creek and Kaspeth Creek, southward and eastward from a line marked N.Y. 10 to the vicinity of Hobson Avenue, Borough of Queens, shown on map of harbor lines approved by the Secretary of War January 21, 1920, as modified by the Secretary of War December 14, 1926, and further modified by the Secretary of War, July 26, 1927, including Muesel Island, and the surrounding shoals in the Boroughs of Brooklyn and Queens, New York City, and be it further,

RESOLVED, That the Commissioners of the Sinking Fund give a certificate, pursuant to the provisions of Sections 215-A and 271-A of the Greater New York Charter, that the premises in question have been ceded to the UNITED STATES OF AMERICA, pursuant to the provisions of said Sections", and

WHEREAS, pursuant thereto the said Commissioners of the Sinking Fund have duly given their certificate that the land in said resolution described had been ceded to THE UNITED STATES OF AMERICA, pursuant to the provisions of Sections 215-A and 271-A of the Greater New York Charter.

NOW KNOW ALL MEN, that the said party of the first part, has ceded, and by these presents does hereby cede, grant and release unto the said party of the second part, hereto all the estate right title and interest of The City of New York in and to lands and lands under water acquired or owned by The City of New York required for the improvement of navigation, within the bulkhead lines of NEWTON CREEK AND KASPETH CREEK, southward and eastward from a line marked N.Y. 10 in the vicinity of HOBSON AVENUE, Borough of Queens, shown on map of harbor lines approved by the Secretary of War, January 21, 1920, as modified by the Secretary of War, December 14, 1926, and further modified by the Secretary of War, July 26, 1927, including Muesel Island and the surrounding shoals in the Boroughs of Brooklyn and Queens, CITY OF NEW YORK, a copy of which said map is hereto annexed. TOGETHER WITH the appertenance and all the estate and rights of the said party of the first part, in and to said premises. TO HAVE AND TO HOLD the above described premises unto the said party of the second part, its successors, and assigns forever. IN WITNESS WHEREOF the party of the first part, hereto has caused these presents to be signed by the Mayor, its corporate seal

at the City Clerk, in triplicate, the day and year first

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...pursuant to the provisions of Sections 218-A and 971-A of the Greater New York Charter, as added thereto by Chapter 334 of the laws of 1916, and Chapter 525, of the laws of 1915, respectively the BOARD OF COMMISSIONERS OF THE SINKING FUND hereby cedes to the UNITED STATES OF AMERICA, free of cost, all the estate, right title and interest of The City of New York, in and to lands and lands under water acquired or owned by The City of New York, required for the improvement of navigation, within the bulkhead lines of Newtown Creek and Maspeth Creek, southward and eastward from a line marked U-V in the vicinity of Heeson Avenue, Borough of Queens, shown on map of harbor lines approved by the Secretary of War January 21, 1920, as modified by the Secretary of War December 24, 1924, and further modified by the Secretary of War, July 26, 1927, including Muesel Island, and the surrounding shoals in the Boroughs of Brooklyn and Queens, New York City, and be it further,

RESOLVED, That the Commissioners of the Sinking Fund give a certificate, pursuant to the provisions of Sections 218-A and 971-A of the Greater New York Charter, that the premises in question have been ceded to the UNITED STATES OF AMERICA, pursuant to the provisions of said Sections, and

WHEREAS, pursuant thereto the said Commissioner of the Sinking Fund have duly given their certificate that the land in said resolution described had been ceded to the UNITED STATES OF AMERICA, pursuant to the provisions of Sections 218-A and 971-A of the Greater New York Charter.

NOW THEREFORE, the said party of the first part, has ceded, and by these presents does hereby cede, grant and release unto the said party of the second part, hereto all the estate right title and interest of The City of New York in and to lands and lands under water acquired or owned by The City of New York, required for the improvement of navigation, within the bulkhead lines of NEWTON CREEK AND MASPETH CREEK, southward and eastward from a line marked U-V in the vicinity of HEESON AVENUE, Borough of Queens, shown on map of harbor lines approved by the Secretary of War, January 21, 1920, as modified by the Secretary of War, December 24, 1924, and further modified by the Secretary of War, July 26, 1927, including Muesel Island and the surrounding shoals in the BOROUGH OF BROOKLYN AND QUEENS, CITY OF NEW YORK, a copy of which said map is hereto annexed, TOGETHER WITH the appurtenances and all the estate and rights of the said party of the first part, in and to said premises, TO HAVE AND TO HOLD the above described premises unto the said party of the second part, with successors, and assigns forever. IN WITNESS WHEREOF the party of the first part, hereto has caused these presents to be signed by the Mayor, its corporate seal to be hereunto affixed, attested by the City Clerk, in triplicate, the day and year first above written.

IN presence of:
ATTEST:
M. J. GRADINE
CITY CLERK

(CORPORATE SEAL) THE CITY OF NEW YORK:
JOSEPH V. MAYER,
ACTING MAYOR

THE CITY AND COUNTY OF NEW YORK: SS: On the 19 day of May in the year, one thousand nine hundred and twenty nine, before me personally came M. J. GRADINE, known, who said to me

Appendix C

duly sworn, did depose and say that he resides in the City of New York, the County of Manhattan, City of New York; that he is the City Clerk of the City of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the BOARD OF COMMONS, HALL OF THE ALBANY STREET OF THE CITY OF NEW YORK and that he signed his name thereto in like authority; AND FURTHER THAT he JOSEPH V. MURPHY, and knows him to be the Acting Mayor of the City of New York; that he was present and saw the said JOSEPH V. MURPHY, execute the foregoing conveyance, and that he said deponent (deponent) subscribed his name attesting the same. H.A. MOOREHEAD, Commissioner of Deeds, City of New York, New York County Registers No. 1, New York County Registers No. 26017, Kings County Registers No. 1000, Bronx County Registers No. 24004, Queens County Registers No. 705; Certificate filed in Richmond County, Commission No. 12345, JULY 14, 1929.

WE, the Commissioners of the Sinking Fund of THE CITY OF NEW YORK, hereby certify that we have made, granted, and conveyed to THE UNITED STATES OF AMERICA free of cost, pursuant to the provisions of Sections 212-a and 213-a of the Greater New York Charter, all the estate right title and interest of The City of New York in and to lands and lands under water acquired or owned by The City of New York, required for the improvement of navigation, within the following lines of Hudson Creek and Westport Creek, mouthward and upstream from a line marked U-V in the vicinity of Hudson Avenue, Borough of Queens, shown on map of harbor lines approved by the Secretary of War, January 11, 1920, as modified by the Secretary of War, December 14, 1920, and further modified by the Secretary of War, July 25, 1927, including Muesel Island and the surrounding shoals in the Boroughs of BROOKLYN and QUEENS, City of New York, a copy of which said map is annexed to the deed of conveyance hereto attached.

NEW YORK, Feb. 2, 1929.

JOSEPH V. MURPHY (--)
Acting Mayor
JOSEPH V. MURPHY (--)
Deputy Mayor
CHARLES A. MCGRAW (--)
Deputy & Acting City Chamberlain
CHARLES A. MCGRAW (--)
Acting President, Board of Aldermen
FRANK A. MCGRAW (--)
Chairman, Committee on Finance
of the Board of Aldermen

The form of the foregoing instrument is approved. Witness my hand and the seal of the Corporation of the City of New York, this 2nd day of February, 1929.

THE LAND ASSUMED by the within instrument lies in section 4 in blocks 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, and Section 8 in blocks 1560, 1561, 1562, 1563 on the latest map of the County of Queens. Witness my hand and the seal of the County of Queens, this 23rd day of August, 1929 at 12 A.M., at the request of the Mayor of the County of Queens, First District, 30 Whitehall St., N.Y. City, N.Y.

COMPALED
[Signature]

Appendix C

L 5063 P 536

shall thereof or the possession of the same and is or may and or shall be in any
 record, recorded, charged, a floated or numbered, IN WITNESS WHEREOF, the said parties have
 executed by their hands and seals the day and year first above written, GEORGE MARIS (L.S.)
 NICK FERIZES (L.S.) JOHN ORFAN (L.S.) Sealed and delivered in the presence of D. A. PAPPY,
 Notary Public, County of New York, SS: On this 28th day of September, 1929, before me
 and appeared George Maris, Nick Ferizes & John Orfan, to me known and known to be to
 be the individuals described in, and who executed the foregoing instrument and they duly
 acknowledged to me that they executed the same, D. A. PAPPY, Notary Public, N.Y. Co. N. Y.
 Co. Clerk's No. 10, N. Y. Reg. No. 10-46, STATE OF NEW YORK, COUNTY OF NEW YORK, SS: I, THOMAS
 H. FARLEY, Clerk of the County of New York, and also Clerk of the Supreme Court for the said
 County the same being a Court of Record, having a seal, DO HEREBY CERTIFY, that D. A. PAPPY,
 Notary Public is subscribed to the deposition or certificate of the proof or acknowledgment
 of the annexed instrument and thereon written, was at the time of taking such deposition or
 proof and acknowledgment a Notary Public in and for such County, duly commissioned and sworn
 and authorized by the laws of said State to take depositions and to administer oaths to
 be used in any court of said State and for general purposes; and also to take acknowledgments
 and proofs of deeds of conveyance for land, tenements or hereditaments in said
 State of New York. And further, that I am well acquainted with the handwriting of said
 Notary Public and verily believe that the signature to said deposition or certificate of
 proof or acknowledgment is genuine, IN TESTIMONY WHEREOF, I have hereunto set my hand and
 affixed the seal of the said Court and Count the 7th day of October, 1929, THOMAS H. FARLEY,
 Clerk (L.S.)

The land affected by this instrument lies in
 Section 9, Block 2563 on the Land Map of the County of Kings, RECORDED Oct. 7, 1929 at
 21:10 PM, RETURNED TO ANISTOOLE LOUVAL, 233 Broadway, New York, N. Y.

92011

\$11.90

THIS INDENTURE, made the 15 day of March,
 one thousand nine hundred and twenty nine, BETWEEN THE CITY OF NEW YORK, a domestic corpo-
 ration party of the first part and THE UNITED STATES OF AMERICA, party of the
 second part, WITNESSETH, that WHEREAS, on the 9th day of January, 1926, the Board of Com-
 missioners of the Sinking Fund of the City of New York, duly adopted a resolution which reads
 as follows: Resolved, That, pursuant to the provisions of sections 216-A and 271-A of the
 Greater New York Charter, as added thereto by Chapter 494 of the Laws of 1915 and Chapter
 523 of the Laws of 1915, respectively, the Board of Commissioners of the Sinking Fund hereby
 ceded to the United States of America, free of cost, all the estate, right, title and
 interest of The City of New York in and to lands and lands under water acquired or owned by
 The City of New York, required for the improvement of navigation, within the bulkhead lines
 of Newtown Creek and Maspeth Creek, southward and eastward from a line marked U-V in the
 vicinity of Hobson Avenue, Borough of Queens, shown on map of harbor lines approved by the
 Secretary of War January 21, 1900 as modified by the Secretary of War, December 14, 1926 and
 further modified by the Secretary of War, July 26, 1927 including Russel Island and the sur-
 rounding shoals in the Boroughs of Brooklyn and Queens, New York City; and be it further Re-
 solved, that the Commissioners of the Sinking Fund give a certificate, pursuant to the pro-

Appendix C

5083

violence of sections 215-A and 971-A of the Greater New York Charter, that the premises in question have been ceded to the United States of America, pursuant to the provisions of said sections; and WHEREAS, aforesaid thereto two said Commissioners of the Sinking Fund have duly given their certificate that the land in said resolution described had been ceded to the UNITED STATES OF AMERICA, pursuant to the provisions of sections 215-A and 971-A of the Greater New York Charter. NOW THEREFORE, the said party of the first part has ceded and hereby all the estate, right, title and interest of the City of New York in and to lands and lands under water acquired or owned by the City of New York, required for the improvement of navigation within the bulkhead line of Newtown Creek and Maspeth Creek, southward and eastward from a line marked U-V in the vicinity of Hoboken Avenue, Borough of Queens, shown on map of harbor line approved by the Secretary of War, January 21, 1920 as modified by the Secretary of War December 14, 1926 and further modified by the Secretary of War July 26, 1927, including Muesel Island and the surrounding shoals in the Boroughs of Brooklyn and Queens, City of New York) a copy of which said map is hereto annexed, TOGETHER with the appurtenances and all the estate and rights of the said party of the first part in and to said premises, TO HAVE AND TO HOLD, the above described premises unto the said party of the second part, its successors and assigns forever. IN WITNESS WHEREOF, the party of the first part hereto has caused these presents to be signed by the Mayor, its corporate seal to be hereunto affixed attested by the City Clerk in triplicate, the day and year first above written. THE CITY OF NEW YORK, by JOSEPH V. MORRIS, Acting Mayor, (Seal of the City of New York) ATTEST: M. J. CRUISE, City Clerk. The form of the foregoing instrument is approved. ARTHUR J. V. HILLY, Acting Corporation Counsel, STATE, CITY AND COUNTY OF NEW YORK. SS: On the 19 day of March, in the year one thousand nine hundred and twenty-eight, before me personally came M. J. CRUISE, to me known, who being by me duly sworn, did depose and say that he resides at No. 201 E. 35th St., in the Borough of Manhattan, City of New York; that he is the CITY CLERK of the City of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Commissioners of the Sinking Fund of the City of New York, and that he signed his name thereto by like authority; and further that he knows JOSEPH V. MORRIS and knows him to be the Acting Mayor of the City of New York; that he was present and saw the said JOSEPH V. MORRIS execute the foregoing conveyance and that he, said deponent, thereupon subscribed his name attesting the same. H. A. MOONHILL, Commissioner of Deeds, City of New York, New York County Clerk's No. 1, New York County Register's No. 29017, Kings County Register's No. 9008, Cert. filed in Richmond County. Commission expires July 12, 1929. BE: the Commissioners of the Sinking Fund of the CITY OF NEW YORK, hereby certify, that we have ceded, granted and conveyed to the UNITED STATES OF AMERICA, free of cost, pursuant to the provisions of Sections 215-A and 971-A of the Greater New York Charter all the estate, right, title and interest of the City of New York, in and to lands and lands under water acquired or owned by the City of New York, required for the improvement of navigation within the bulkhead line of Newtown Creek and Maspeth Creek, southward and eastward from a line marked U-V in the vicinity of Hoboken Avenue, Borough of Queens, shown on map of harbor line approved by the Secretary of War January 21, 1920 as modified by the Secretary of War December 14, 1926 and further modified

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By the Secretary of War July 26, 1927 including Miami Island and the surrounding shoals of the Boroughs of Brooklyn and Queens, City of New York, a copy of which said map is annexed to the deed of cession hereto attached. New York, February 28, 1929. JOSEPH V. ROGER, Acting Mayor, C. W. HENRY, Comptroller, CHARLES STEWART, Deputy & Acting City Chamberlain, CHARLES A. ROMANUS, Acting President, Board of Aldermen, FRANK A. CUNNINGHAM, Chairman, Committee on Finance of the Board of Aldermen, the form of the foregoing instrument is approved. ARTHUR J. V. HILLY, Acting Corporation Counsel. STATE OF NEW YORK, COUNTY OF KINGS, SS: I, SAMUEL J. LEFTOFF, Clerk in the United States Engineers' Office, First District, New York City, DO HEREBY CERTIFY, that a copy of the map referred to in the within instrument was on the 7th day of October, 1929, filed by me in the office of the Register of Kings County as and by the number 2122. SAMUEL J. LEFTOFF, STATE OF NEW YORK, COUNTY OF KINGS, SS: On this 7th day of October 1929, before me personally came SAMUEL J. LEFTOFF, to be known to be the individual described in, and who executed the foregoing certificate and acknowledged to me that he had executed the same. FRED A. ROSENBERG, Notary Public, Kings County, N. Y.

The land affected by this instrument, lies in Section 10, Blocks 2016, 2024, 2040, 2048A, 2056, 2059, 2074, 2901, 2902, 2903, 2904, 2905, 2920, 2930A, 2948A on the Land Map of the County of Kings. RECORDED Oct. 7, 1929 at 2 minute past 12 PM. RETURNED TO WAR DEPARTMENT, U.S. Engineer Office, 39 Whitehall St. N.Y.C.

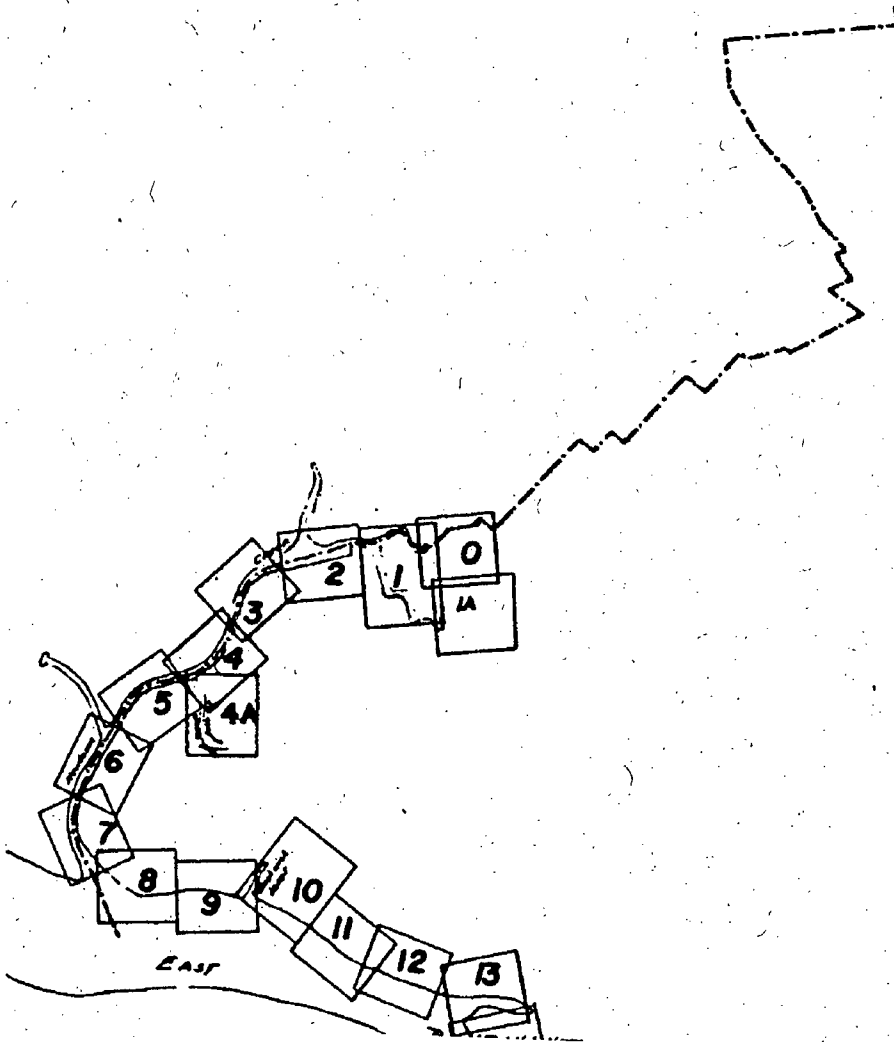
91551

\$5.50

THIS INDENTURE, made the second day of October, nineteen hundred and twenty-nine, BETWEEN MAX WILSH, husband, residing at 1925 East 24th Street, Borough of Brooklyn, City of New York, and ABRAHAM PARKER and ROSE KARMER, his wife, both residing at 754 Crown Street, Borough of Brooklyn, City of New York, parties of the first part and UNION COPIER STORE FRONT CO., INC., a domestic corporation of 2106 Atlantic Avenue, Borough of Brooklyn, City of New York, party of the second part, WITNESSETH, that in consideration of ONE HUNDRED (100.00) DOLLARS, lawful money of the United States, and other valuable consideration, paid by the party of the second part, who hereby grant and release unto the party of the second part, its successors and assigns forever, ALL parcel or parcel of land with the buildings and improvements thereon erected, situate, lying and being in the Borough of Brooklyn, City and State of New York, known as 2119 Fulton Street, Borough of Brooklyn, City and State of New York, and are particularly described as follows:— BEGINNING, at a point on the northerly side of Fulton Street, distant twenty-four (24) feet five (5) inches easterly from the corner formed by the intersection of the northerly side of Fulton Street with the easterly side of Wyona Street, running thence northerly parallel with Wyona Street and part of the distance through a party wall, eighty (80) feet; thence easterly and parallel with Fulton Street, twenty-five (25) feet seven (7) inches; thence southerly and parallel with Wyona Street, eighty (80) feet to the northerly side of Fulton Street, and thence westerly along the northerly side of Fulton Street, twenty-five (25) feet, seven (7) inches to the point or place of beginning. SUBJECT to any state of facts a survey would show, including the exact locations and dimensions of the premises described above. SUBJECT to Railroad consents recorded in the office of the Register of the County of Kings in Liber 2212 of Conveyances, Page 243. SUBJECT to zoning laws and regulations adopted by the Board of Estimate and Apportionment of the City of New York.

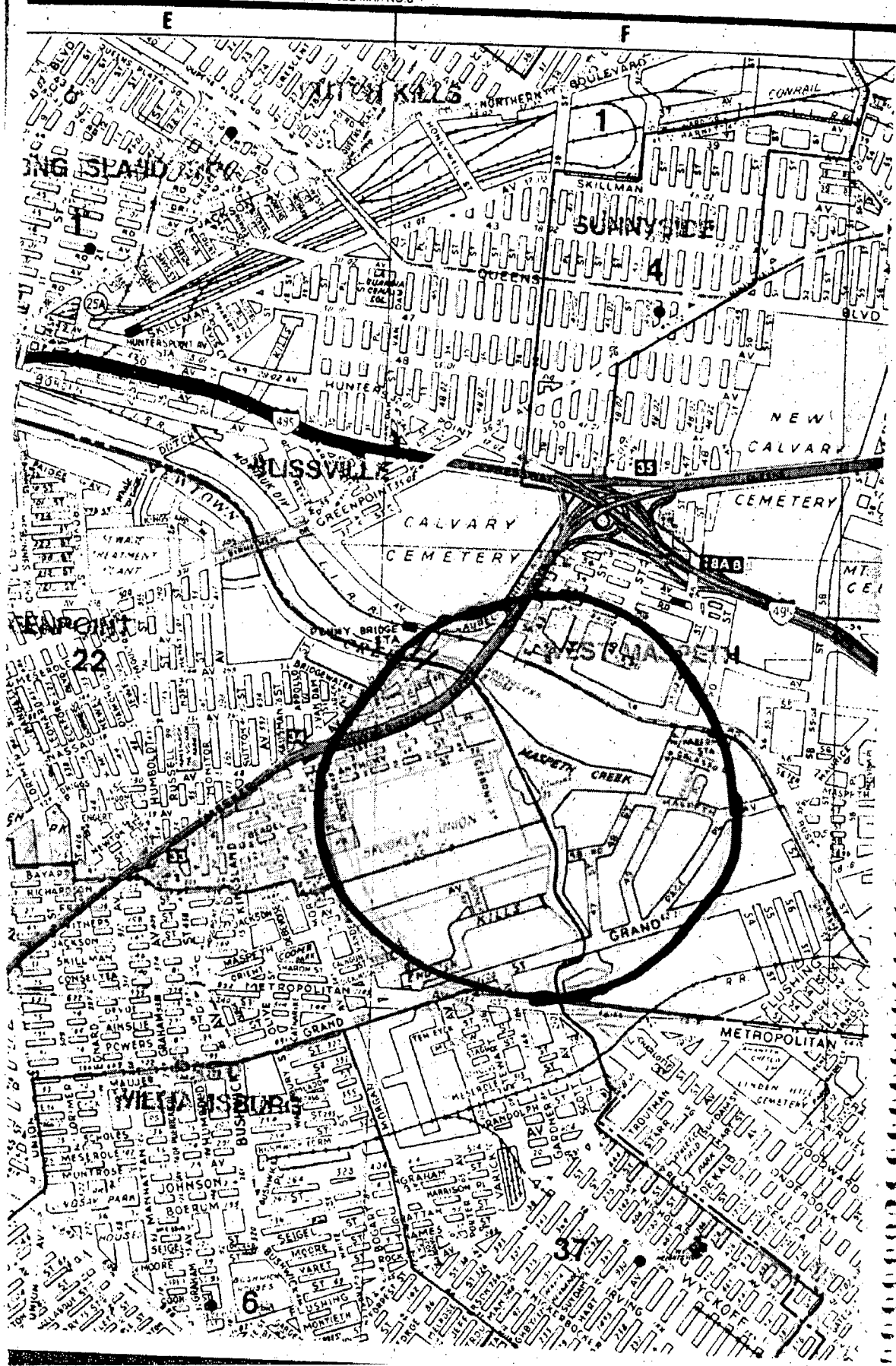
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FOR ADJOINING AREA SEE MAP NO. 8



SEE PAGE 33

1/15 → 12/3

455-B 43RD. ~~HOBSON~~

WASHINGTON AVE

AVE ST.

2278

663.58

43RD. ~~CLAY~~

AVE. PL.

694.85

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44TH ~~MONTGOMERY~~

HAMILTON AVE

AVE. ST.

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CREEK

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DIGEST
of
SPECIAL STATUTES

Relating to

THE CITY OF NEW YORK

And each of the Municipalities comprised within or consolidated to form
said City, and not contained in the Greater New York Charter

From

FEBRUARY 1, 1778, TO JANUARY 1, 1921

Together With

**A List of Corporations Incorporated by Special Statutes within the
Territory now included in the Territory embraced
within Greater New York.**

Edited and Printed under the Supervision of the New York City Charter
Commission, created by Chapter 848, Laws of 1921

ALBANY
J. B. LYON COMPANY, PRINTERS
1922

Appendix C

CITY OF NEW YORK

repealed

set

to be graded according to

not amended though an ex-
l as introduced amended the
section was in the same terms
ch. 311.

former matrons and assistant
protection continued in office.
New York, amendment.

ch. 378, § 115, relating to

ary fee.

ree, N. Y. City.

ch. 110, § 2124 (as amended
to Hell Gate pilots.

01. amendments.

ch. 366, § 1022, relating to

1 to controller.

01. amendments.

ch. 486, § 518a (added by

to fixing, determining and

water.

01. amendments.

ch. 466, § 553 (added by

to assessments for grading

1010. amendment.

ch. 669, by adding thereto

relating to segregation of

1. amendment.

ch. 468, by adding thereto

relating to registration of

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ch. 230, § 3, relating to

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ch. 468, § 167, relating to

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DIGEST OF SPECIAL STATUTES OF THE CITY OF NEW YORK 795

Statutes Not Specifically Repealed

Year	Ch.	§	Subject
1920	337	all.	Western line of Narrows avenue as it formerly existed, thence southerly along the former westerly line of Narrows avenue to a point 150 feet westerly from the east line of the shore road, thence southerly parallel with the shore road to an intersection with the southerly bound-ary of the lands assigned.
1910	338	all.	Chicago New York charter, 1901, amendments. This act amended L. 1901, ch. 466, § 634, relating to conduct of hasty proceedings. This act also, by section 2, repealed L. 1901, ch. 466, §§ 653, 695-696.
1910	339	all.	Inferior Criminal Courts Act, 1910, amendment. This act amended L. 1910, ch. 450, § 43 (as added by L. 1915, ch. 331) by adding thereto two new subdivisions to be known as subdivisions j and k.
1910	340	all.	Inferior Criminal Courts Act, 1910, amendment. This act amended L. 1910, ch. 450, § 74, relating to domestic relations court.
1910	341	all.	Municipal court of the City of New York. This act amended L. 1915, ch. 279, § 110, relating to time for rendering judgment or decision.
1910	508	all.	Greater New York charter, 1901, amendments. This act amended L. 1901, ch. 466, § 522, relating to deepening water adjacent to private wharves, piers, docks, bulkheads or lands. This act also amended sec-tion 524, relating to assessments for deepening water in docks, etc.
1910	509	all.	Baptist Home for the Aged, City of New York. This act authorized the commissioners of the sinking fund to sell and convey to the Baptist Home for the Aged in New York City (formerly Ladies' Home Society of the Baptist Churches of the city of New York) property lying within the block bounded by Lexington and Park avenues and Sixty-seventh and Sixty-eighth streets.
1910	511	all.	Richard L. Sangunitto, rehearing of charges, City of New York. This act authorized the rehearing of the charges against Richard L. Sangunitto, formerly a member of the police force.
1910	512	all.	Harlem river driveway, N. Y. City. This act amended L. 1893, ch. 102, § 10, relating to sidewalks: restrictions on commercial vehicles and rail-ways: rules.
1910	513	all.	Summary proceedings to remove monthly tenants; Brooklyn and N. Y. City. This act amended L. 1882, ch. 303 (as re-enacted by L. 1889, ch. 357) § 1, relating to notice to tenant. This act was affected by L. 1913, ch. 049, and by L. 1920, ch. 209.
			Newtown creek, right of lands and of lands under water in City of New York. This act provided for the grant and release by the state to the city of New York of all the title and inter-

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INDEX OF

Statutes Not Specifically Repealed

Year	Ch.	§	Subject
			set of the state is and to the lands and loads under water in Newtown creek between the original line of high water and the pierhead line which may be established by the secretary of war, including Muesel island, and the surrounding shoals from the easterly line of Anthony street prolonged to the westerly line of Maspeth avenue prolonged. This act also provided for the improvement of the lands by the city of New York and the sale of such lands as were not required by the city. This act also contained a saving clause relating to the rights and privileges theretofore granted by the state to owners of adjoining uplands to the lands under water between the bulkhead line established by law and the high water mark between the southerly line of Anthony street and the center line of Division street. This act also provided that the provisions of any acts, including the Greater New York Charter, which are inconsistent with this act, and in so far only as they are inconsistent with this act, shall have no application to the rights, powers, grants and obligations authorized or created by this act or to the proceedings to be had under the authority of the act.
1910	518	all	Greater New York charter, 1901, amendment. This act amended L. 1901, ch. 488, § 278b (added by L. 1914, ch. 424), relating to transfer of members of the police force of the board of water supply to the police department of the city of New York.
1910	516	all	Municipal court of the city of New York. This act amended L. 1915, ch. 270, § 3, subd. b, ¶ 1, 2, relating to the boundaries of the first and second districts, and also provided for the election of an additional justice for the second district.
1910	516	all	Inferior Criminal Courts Act, 1910, amendments. This act amended L. 1910, ch. 650, § 55, relating to summons may be substituted for arrest; when.
1910	515	all	Greater New York charter, 1901, amendment. This act amended L. 1901, ch. 445, § 355, relating to the police department; when members of force entitled to pension; amount and duration. This section was affected by L. 1920, ch. 508.
1910	510	all	Peter T. Rehill, City of New York. This act authorized the returning of the charges upon which Peter T. Rehill, formerly a police sergeant, was dismissed from the service.
1910	350	all	Greater New York charter, 1901, amendment. This act amended L. 1901, ch. 466, § 165 (added by L. 1905, ch. 539), relating to retirement from active service of officers, clerks and employees; authority to recommend retirement. This section was affected by L. 1920, ch. 244.
1910	555	all	Sheriff, duties and office administration, N. Y. City and County. This act amended L. 1900, ch. 522, § 1, relating to salaries. This section was affected by L. 1920, ch. 505.

Year	Ch.	§
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1910 533 all

1919 556 all

1919 611 all

1918 613 all

1919 621 all

1920 649 all

1919 650 all

1920 9 all

1920 16 all

1920 70 all

the fiscal year ending June thirty, nineteen hundred and twenty-five, shall be available for the use of such reservations respectively but shall be expended under the direction of the Finger Lakes state parks commission.

Transfer
of powers
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ation com-
mission.

§ 7. The rights, powers and duties of the conservation commission under chapter six hundred and ninety-three of the laws of nineteen hundred and twenty-three in relation to Watkins Glen, Enfield Falls park and other parks in the Finger Lakes region are hereby transferred to the Finger Lakes state parks commission, but until the commissioners of the Finger Lakes state parks commission have been appointed and shall have qualified, the conservation commission shall exercise all the powers and perform all the duties as prescribed by said chapter in relation to said parks immediately prior to the time this act takes effect. The conservation commission shall deliver to the Finger Lakes state parks commission all contracts, books, maps, plans, papers and reports of whatever description relating to Watkins Glen, Enfield Falls park and other parks in the Finger Lakes region. This act shall not affect any contract made, or action or proceeding brought by the conservation commission, but such contract may be enforced and such action or proceeding may be prosecuted in the name of the Finger Lakes state parks commission. After this act takes effect, the unexpended balances of all moneys appropriated by chapter six hundred and ninety-three of the laws of nineteen hundred and twenty-three for Watkins Glen, Enfield Falls park and other parks in the Finger Lakes region shall be expended under the direction of the Finger Lakes state parks commission.

Delivery of
contracts,
books, etc.,
by con-
serva-
tion com-
mission.
Pending
contracts
and
actions.

Unexpended
appro-
priations.

Art. 93,
§ 100, art.
10 of 1118,
111, re-
pealed.

§ 8. Article eight-a of the public lands laws* as added by chapter three hundred and forty-three of the laws of nineteen hundred and twenty, and article ten of the public lands law as added by chapter seven hundred and thirty-one of the laws of nineteen hundred and eleven and amended by chapter four hundred and ninety-five of the laws of nineteen hundred and fifteen, are hereby repealed.

§ 9. This act shall take effect immediately.

CHAPTER 89

AN ACT to authorize the commissioners of the land office to grant and release to the city of New York certain lands and lands under water of Newtown creek for the purpose of carrying out the improvements to such creek provided for by chapter five hundred and thirteen of the laws of nineteen hundred and nineteen.

Became a law April 1, 1924, with the approval of the Governor. Passed, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. To the end that the city of New York may carry out the improvements to Newtown creek provided for in chapter five

* So in original. Evidently should be "law."

hundred and thirteen of the laws of nineteen hundred and nineteen, and notwithstanding is hereby ceded and given to the commissioners of the land office of New York all the right of New York in and to all the creek from Meeker at southerly terminus at Madison Avenue, including lands at a point about Newtown creek and including shoals.

§ 2. This act shall take effect immediately.

AN ACT to amend the civil practice act and to revise a court act and to revise a law April 1, 1924.

The People of the State of New York, do enact as follows:

Section 1. Section fifty-five of the civil practice act, is hereby amended to read as follows: § 155. Fees of printer. As prescribed by law, the proper publishing summons, notice by law to be published, is not less than twelve per cent charge per line, the fee for insertion in newspapers has five cents per line for such more circulation and less cents per line for such newspaper and less than fifteen cents per line for such newspaper and less than fifteen cents for each additional five thousand papers until the maximum. To all of the above rules the initial insertion charges, including line charges, all paragraph endings, titles, and lines where the same are in position. Display advertisements (fourteen lines to each line).

Section materially amended.

YORK, 1924

[CHAP.

fourteen hundred and twenty-
such reservations respectively
direction of the Finger Lakes

of the conservation commis-
ed thirty-three of the laws of
in relation to Watkins Glen,
in the Finger Lakes region are
the state parks commission, but
Finger Lakes state parks com-
all have qualified, the conserva-
the parks and perform all the
in relation to said parks im-
takes effect. The conservation
Finger Lakes state parks commis-
ma, papers and reports of what-
on Glen, Enfield Falls park and
gion. This act shall not affect
proceeding brought by the com-
may be enforced and
prosecuted in the name of the
too. After this act takes effect,
appropriated by chapter
of laws of nineteen hundred and
Enfield Falls park and other parks
expended under the direction
commissioner.

lands laws* as added by chap-
of the laws of nineteen hundred
a public lands law as added
of the laws of nineteen
by chapter four hundred and
hundred and fifteen, are hereby

immediately.

R 89

of the land office to grant and
in lands and lands under water of
the improvements to such
and thirteen of the laws of

approval of the Governor. Passed,
in title.

reapproved in Senate and Assembly.

of New York may carry out
provided for in chapter five

law.

90]

LAWS OF NEW YORK, 1924

131

hundred and thirteen of the laws of nineteen hundred and nine-
teen, and notwithstanding any provisions of such chapters there
is hereby ceded and granted, and, upon application of the com-
missioners of the sinking fund of the city of New York, the com-
missioners of the land office are authorized to convey to the city
of New York all the right, title and interest of the state of New
York in and to all the lands and lands under water in Newtown
creek from Meeker avenue and Laurel Hill boulevard to its
southerly terminus at a point about fifty feet north of Metro-
politan avenue, including Maspeth creek from its easterly ter-
minus at a point about five hundred feet east of Berlin avenue to
Newtown creek and including Mussel island and the surrounding
shoals.

§ 2. This act shall take effect immediately.

CHAPTER 90

AN ACT to amend the civil practice act, the public officers law, the sur-
rogate's court act and the tax law, in relation to the fees of printers.
Became a law April 1, 1924, with the approval of the Governor. Passed,
three fifths being present.

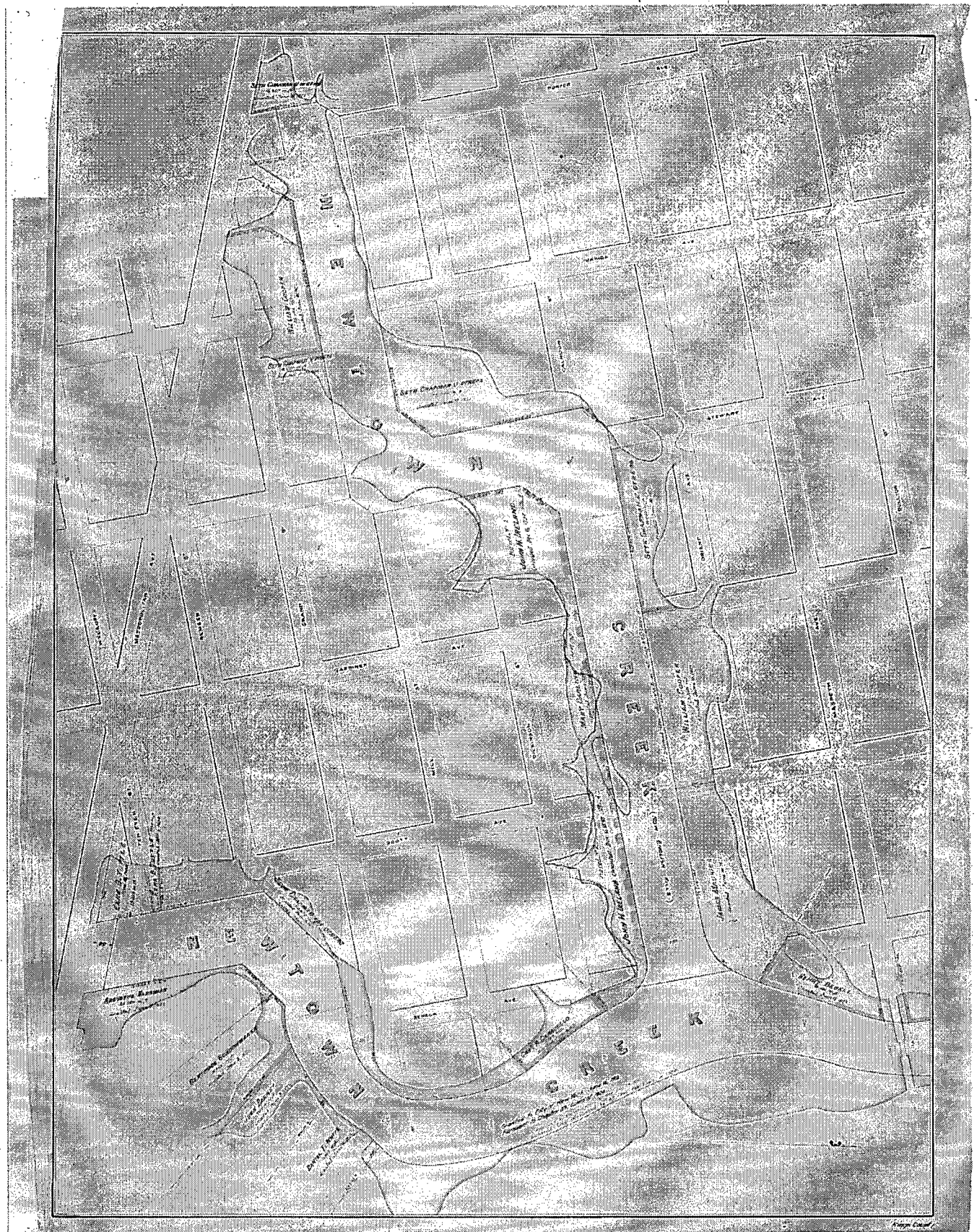
The People of the State of New York, represented in Senate and Assembly,
do enact as follows:

Section 1. Section fifteen hundred and fifty-one of the civil
practice act, is hereby amended to read as follows:

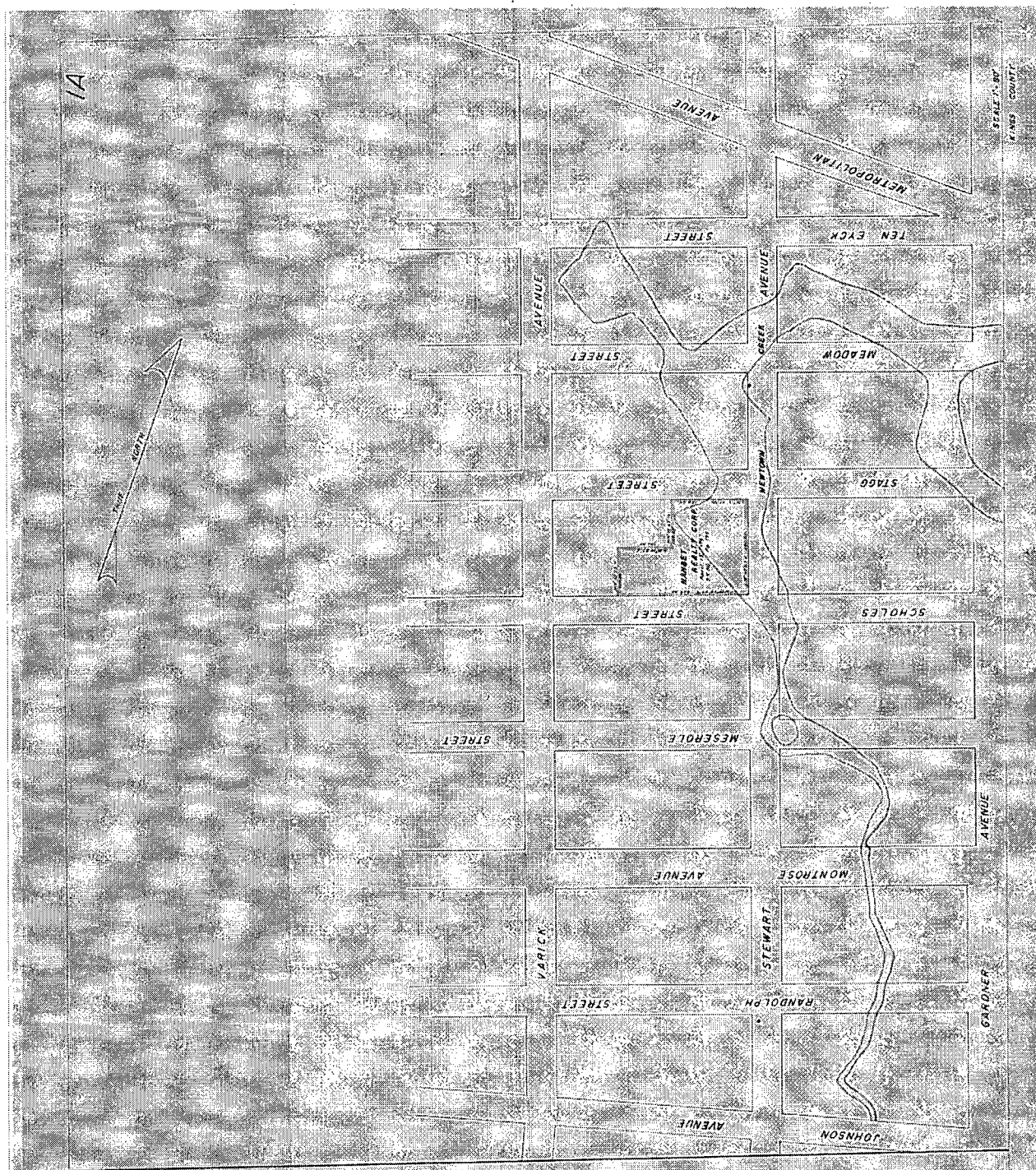
§ 1551. Fees of printers. Except as otherwise specially pre-
scribed by law, the proprietor of a newspaper is entitled for
publishing summons, notice, order or other advertisement, required
by law to be published, to four cents per line of a column width
not less than twelve pica ems, provided that in computing such
charge per line, the line shall average at least six words for each
insertion in newspapers having less than five thousand circulation;
five cents per line for such newspapers having five thousand or
more circulation and less than seven thousand five hundred; six
cents per line for such newspapers having seven thousand five hun-
dred or more circulation and less than ten thousand, seven cents
per line for such newspapers having ten thousand or more circula-
tion and less than fifteen thousand; and one cent per line in addi-
tion to the seven cents for the initial ten thousand circulation, for
each additional five thousand circulation possessed by such news-
papers until the maximum rate of twenty cents per line is reached.
To all of the above rates two cents per line shall be added to
the initial insertion charge of each separate advertisement. In
reckoning line charges allowance shall be made for date lines,
paragraph endings, titles, signatures and similar short lines as full
lines where the same are set to conform to the usual rules of com-
position. Display advertising shall be charged agate measurement
(fourteen lines to each inch), twelve to thirteen pica ems wide,

*Section materially amended.

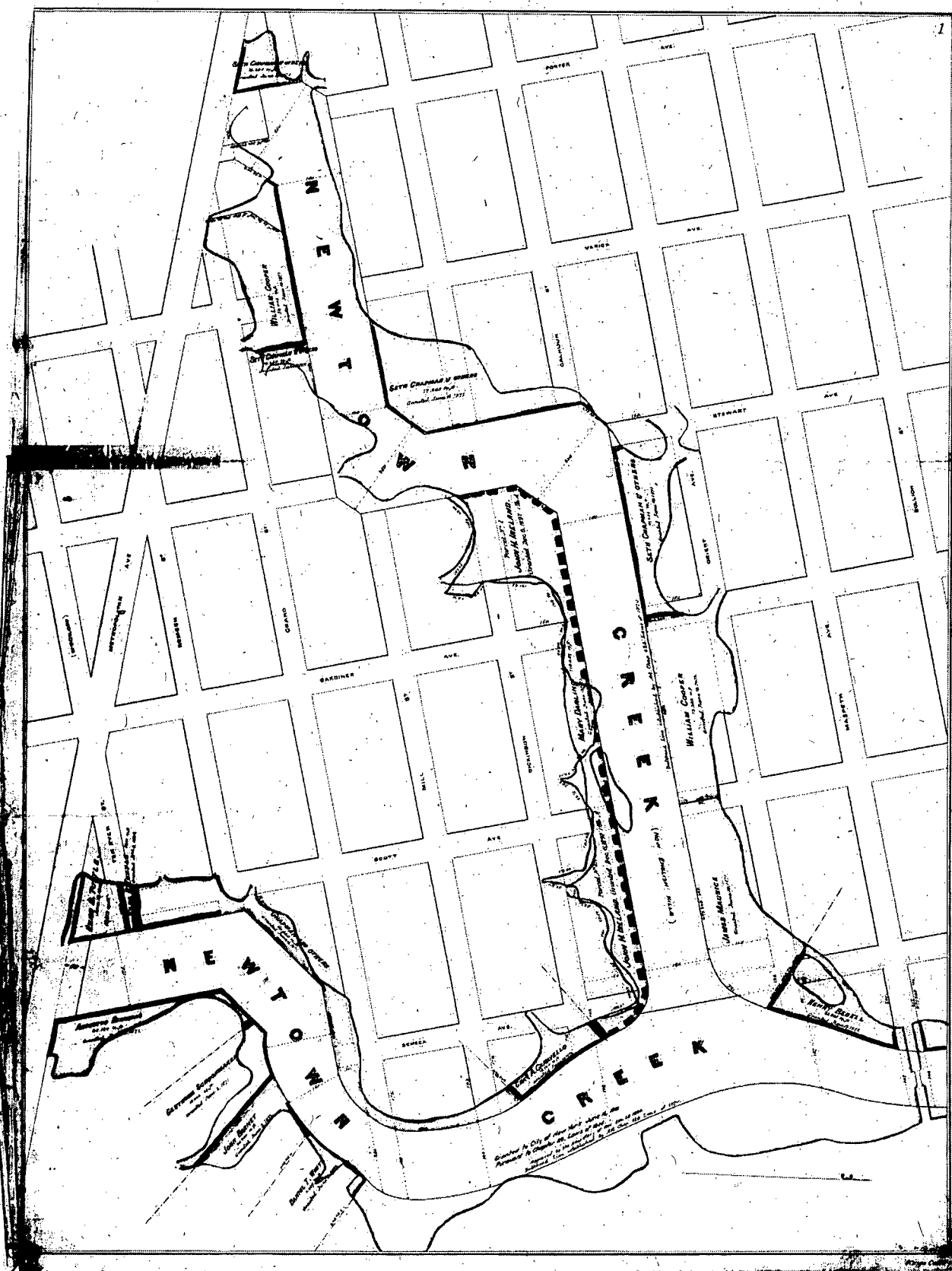
Appendix C



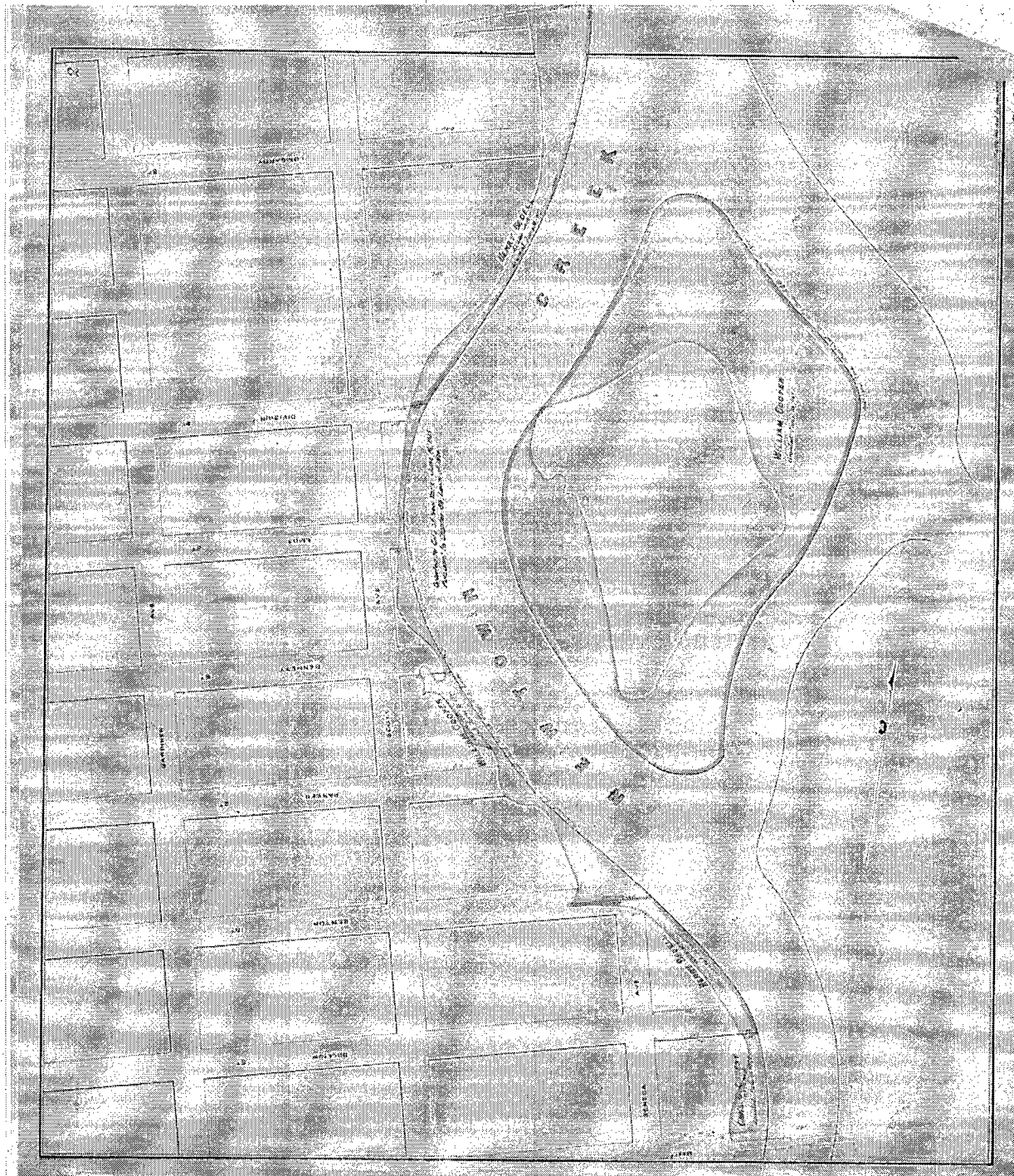
Appendix C



Appendix C

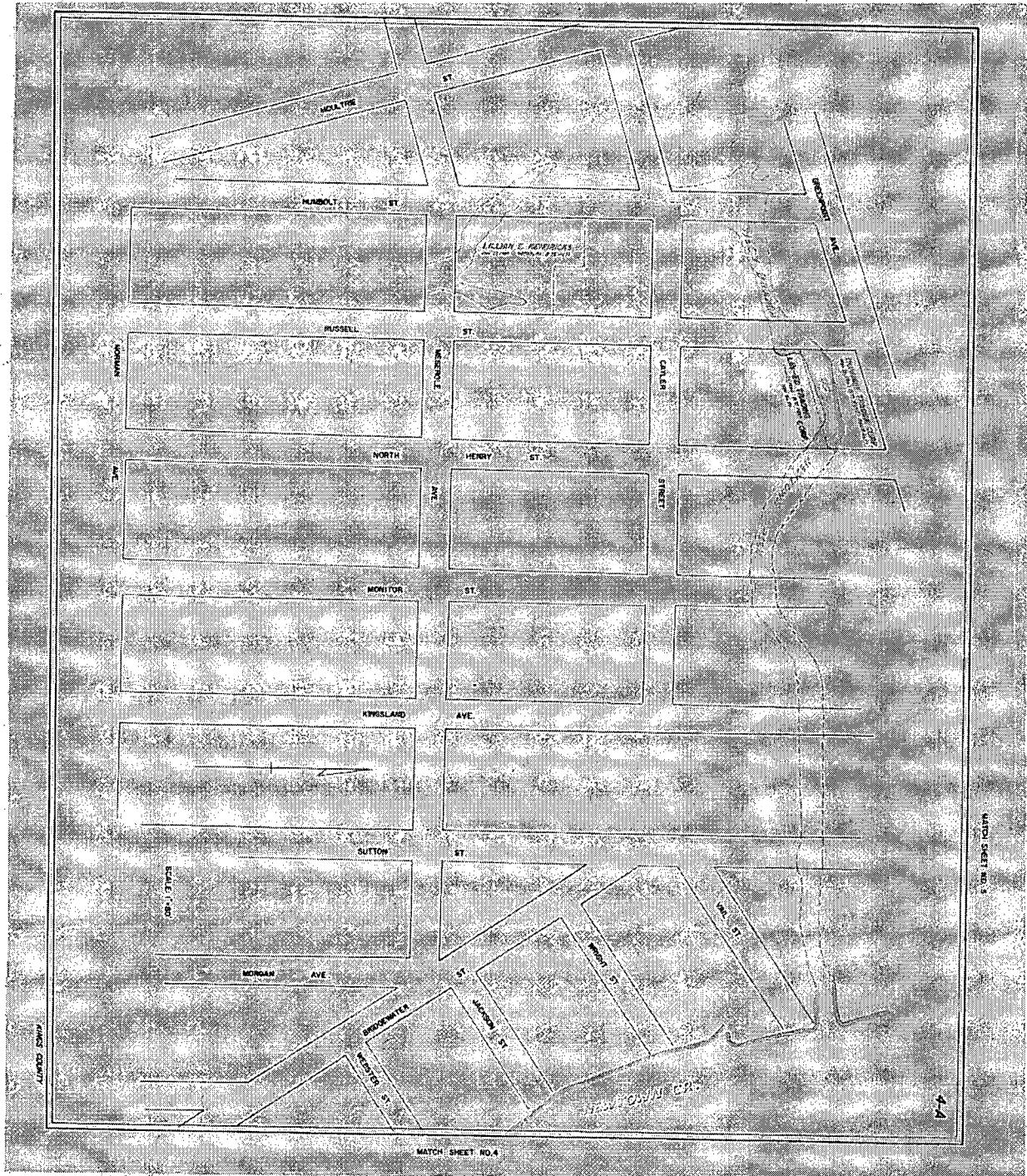


Appendix C

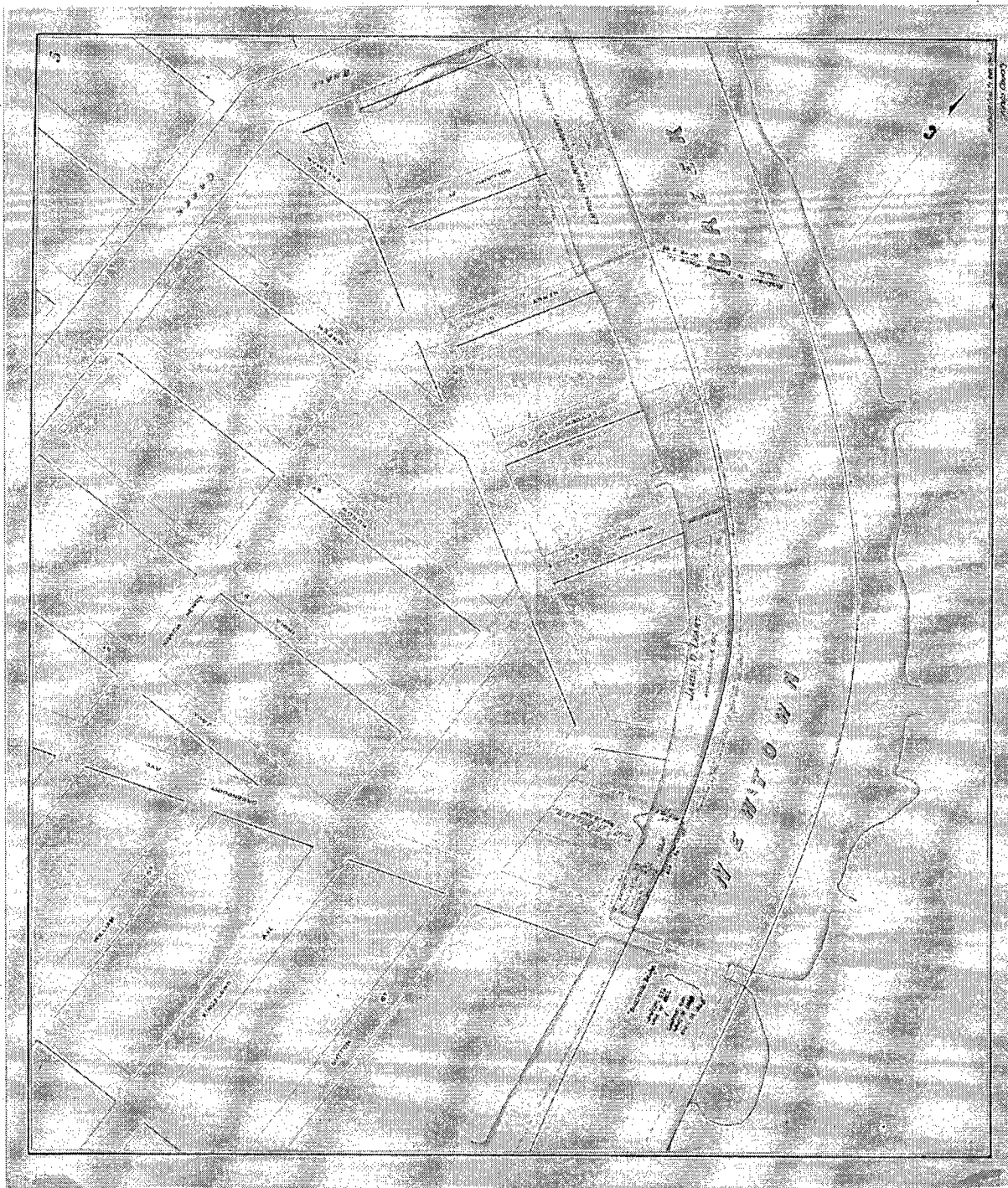


[illegible]

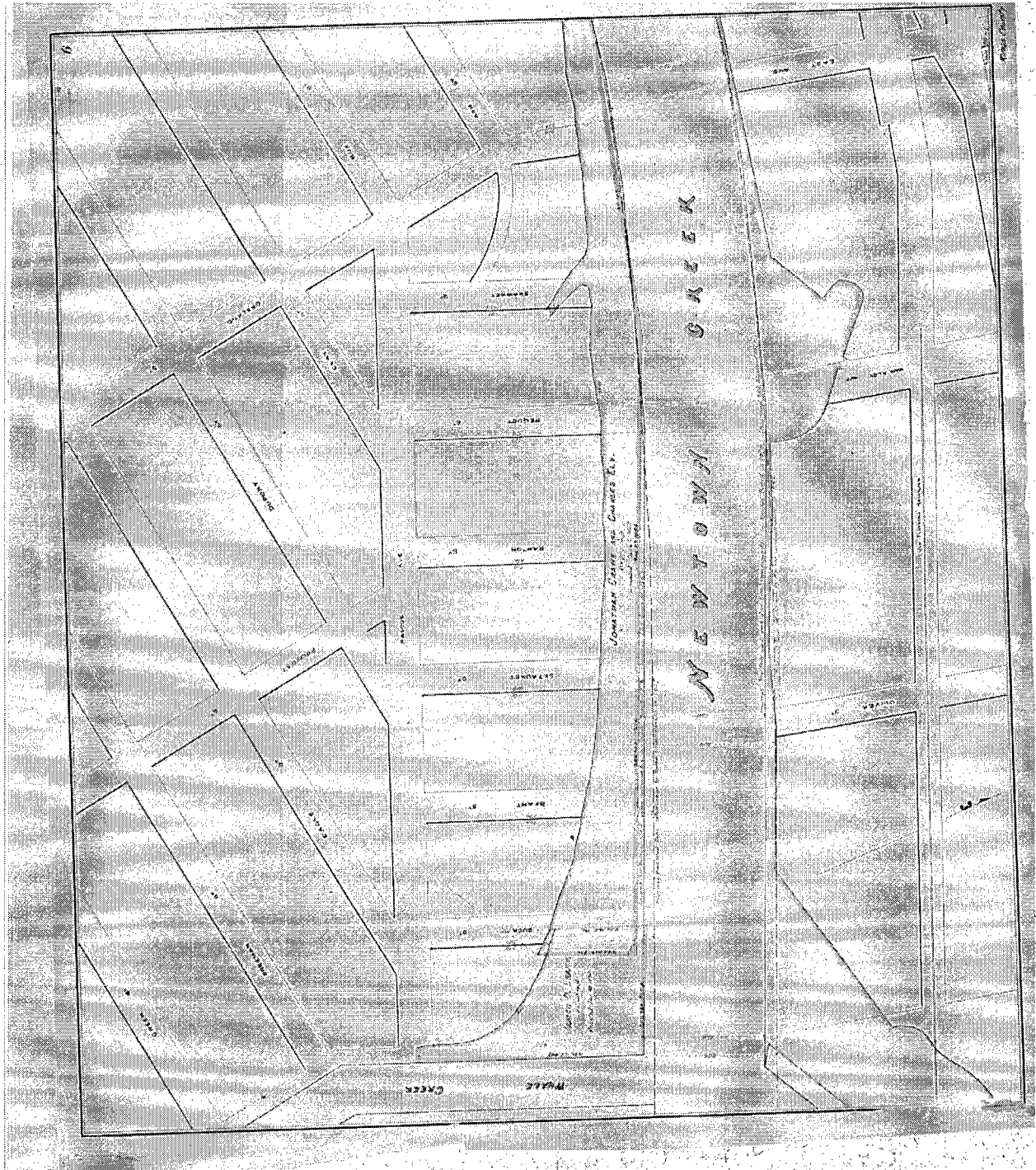
Appendix C



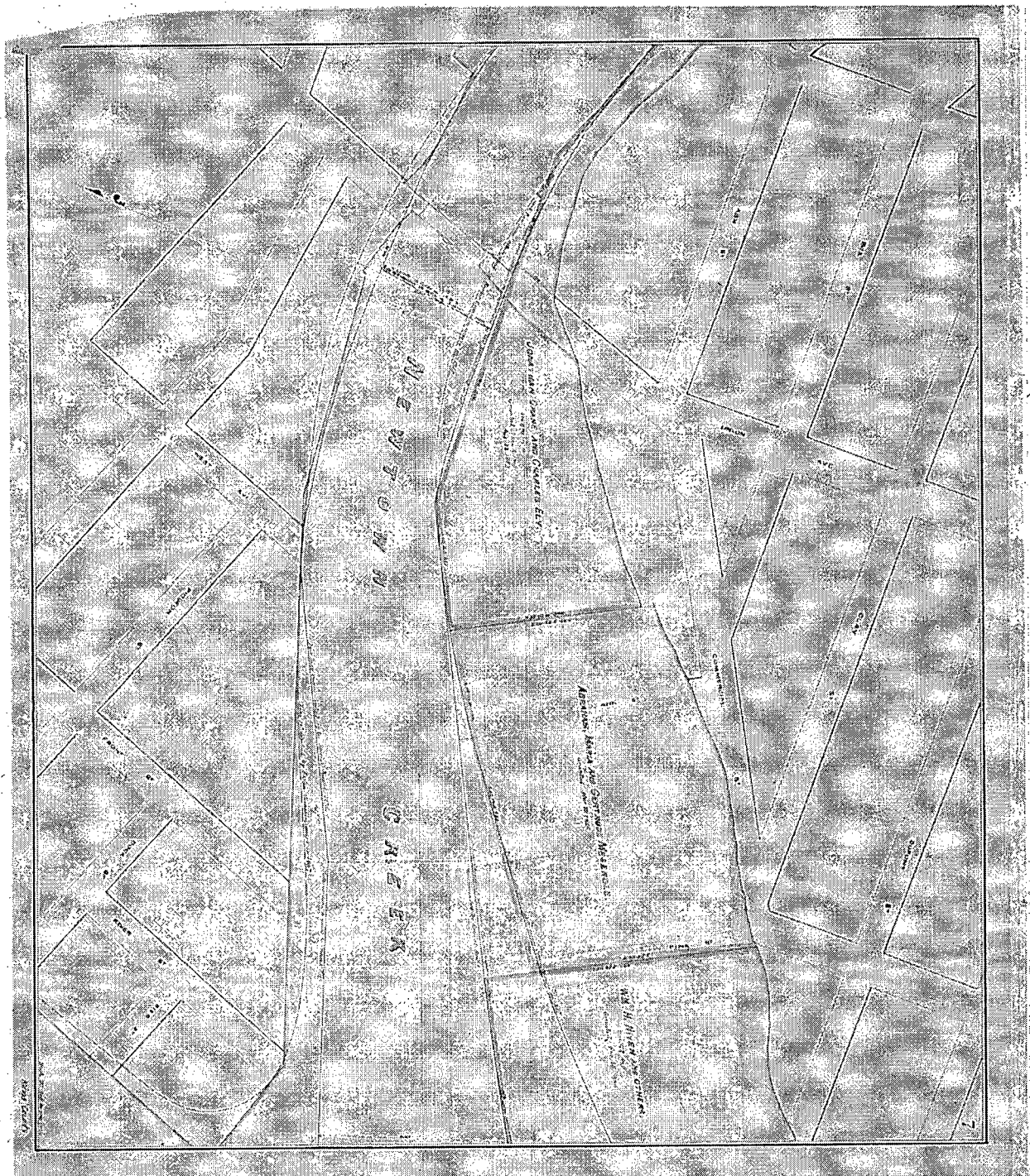
Appendix C



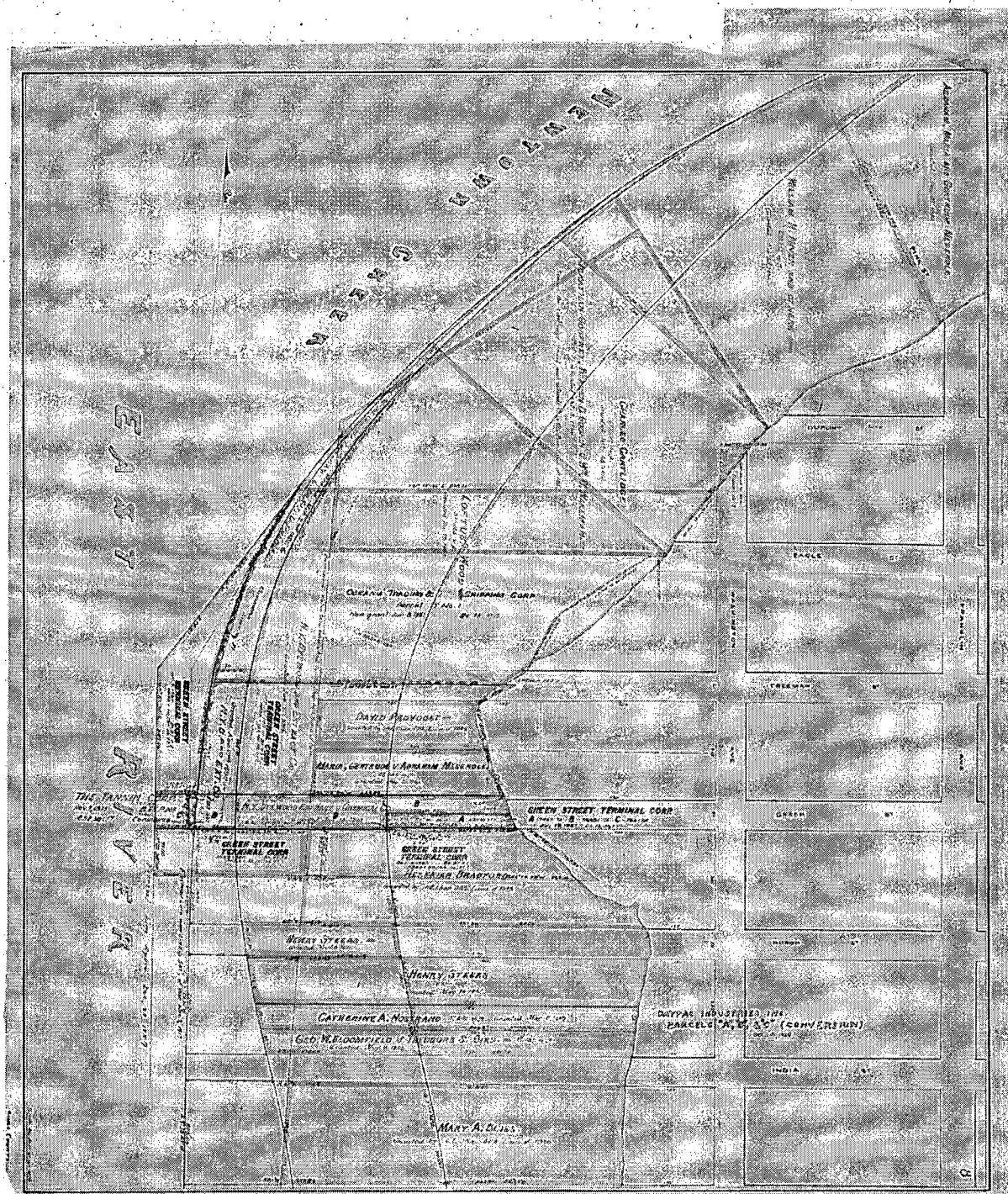
Appendix C



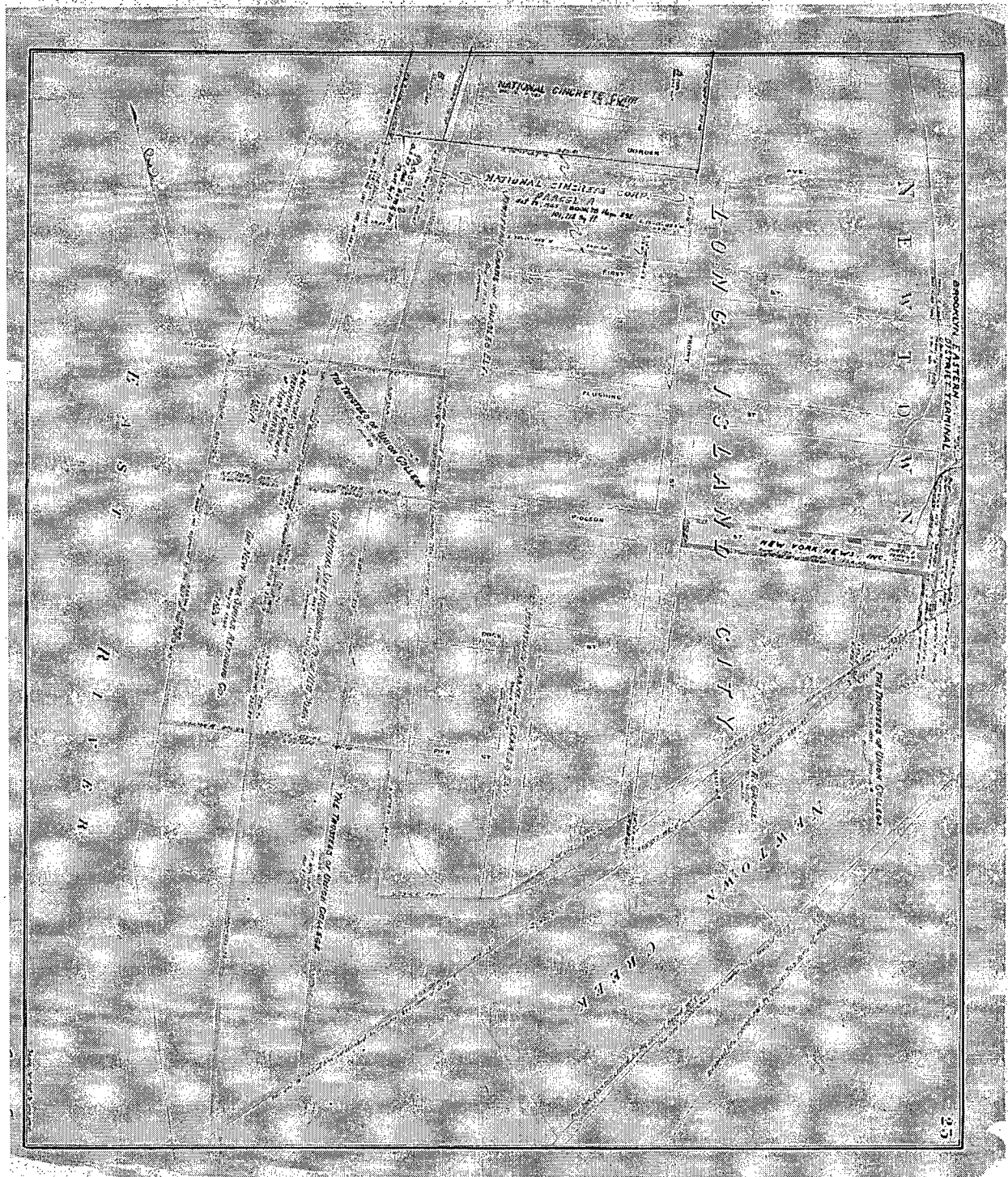
Appendix C



Appendix C



Appendix C



This is a detailed street map of New Town, Long Island City, New York. The map shows a grid of streets including Union Ave, Vernon Ave, East Ave, and Van Alst Ave. It also depicts the Long Island City Waterfront, the Long Island City Ferry Terminal, and the Long Island City Waterfront Park. The map is oriented with North at the top and includes a scale bar in the bottom right corner.

Appendix D

D. Notice of Intent to Sue Letter from NY State Attorney General Cuomo



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
Attorney General

DIVISION OF PUBLIC ADVOCACY
Environmental Protection Bureau

February 8, 2007

Via Certified United States Mail

ExxonMobil Corporation
Corporate Headquarters
5959 Las Colinas Boulevard
Irving, Texas 75039-2298

ExxonMobil Corporation
Corporation Service Company
Registered Agent in New York State
80 State Street
Albany, New York 12207

Steve P. Trifiletti
ExxonMobil Refining & Supply Company
Global Remediation
Inwood Terminal
464 Doughty Boulevard
Inwood, New York 11096

Chevron Corporation
6001 Bollinger Canyon Rd.
San Ramon, California 94583

Chevron Corporation
The Prentice-Hall Corporation System, Inc.
Registered Agent in New York State
80 State Street
Albany, New York 12207

Chevron Environmental Management
Company
6001 Bollinger Canyon Rd.
San Ramon, California 94583

Chevron Environmental Management
Company
Corporation Service Company
Registered Agent in New York State
80 State Street
Albany, New York 12207-2543

BP America Inc.
4101 Winfield Rd.
Warrenville, Illinois 60555

BP America Inc.
CT Corporation System
Registered Agent in New York State
111 Eighth Ave.
New York, New York 10011

Phelps Dodge Corporation
One North Central Ave.
Phoenix, Arizona 85004-4416

Phelps Dodge Corporation
CT Corporation System
Registered Agent in New York State
111 Eighth Ave.
New York, New York 10011

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Keyspan Corporation
Corporation Service Company
Registered Agent in New York State
80 State Street
Albany, New York 12207-2543

Keyspan Corporation
One Metrotech Center
Brooklyn, New York 11201

RE: Notice of Intent to Sue ExxonMobil Corporation, ExxonMobil Refining & Supply Company, Chevron Corporation, Chevron Environmental Management Company, BP America Inc., Phelps Dodge Corporation, and Keyspan Corporation for Violations of the Resource Conservation and Recovery Act in Greenpoint, Brooklyn, New York

Dear Sirs and Madams:

The State of New York (State) hereby gives notice of its intent to sue ExxonMobil Corporation and its affiliate, ExxonMobil Refining & Supply Company (together "Exxon"), Chevron Corporation and its affiliate, Chevron Environmental Management Company (together "Chevron"), BP America Inc. (BP), Phelps Dodge Corporation (PD), and Keyspan Corporation (Keyspan) under 42 U.S.C. § 6972(a)(1)(B) for violating the federal Resource Conservation and Recovery Act (RCRA) by creating an imminent and substantial endangerment to health and the environment in Newtown Creek (the Creek) and portions of the adjacent shoreline. In its action, the State will seek injunctive relief under RCRA for solid or hazardous waste contamination of soils and groundwaters, and the surface waters and sediments of the Creek, all of which may pose, separately and collectively, an imminent and substantial endangerment to the health of Greenpoint's residents and to the Creek and its surrounding environs. The State's ultimate goal is the cleanup of the Creek.

I. The Contamination of Newtown Creek with RCRA Solid or Hazardous Wastes

An historic and underappreciated resource, Newtown Creek is a 3.5-mile-long waterway that separates Queens and Brooklyn, New York and that flows into the East River, making it a tributary of the invaluable New York Harbor. The Creek itself has several tributaries – Whale Creek, Dutch Kills, Maspeth Creek, and English Kills – and approximately 170 acres of sediment bed.

Recent samples of the Creek's surface waters and sediments have revealed that industrial wastes, including petroleum, are present in the Creek. Attached as Exhibit A is a list of the wastes, or chemicals, currently found in the Creek. Some of those listed – for example, arsenic, lead, copper, various polychlorinated biphenyls (PCBs), various pesticides, various polynuclear aromatic hydrocarbons (PAHs), various semi-volatile organic compounds (SVOCs), and various volatile organic compounds (VOCs) – are known to be toxic or carcinogenic. Most, if not all, of

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the chemicals listed in Exhibit A are solid or hazardous wastes under RCRA when, as here, they have been discarded.

The presence of these RCRA wastes in the Creek's waters and sediments may pose a threat to the health of its citizens and residents – in particular, nearby residents, subsistence fishers and crabbers, and recreational users. The continued presence of these wastes may also pose a threat to the Creek's aquatic life – fish, shellfish, crustaceans, and plants – and to any birds – waterfowl and wading birds, for instance – that migrate through or eat biota from the Creek. In addition, the Creek's contamination endangers the various other natural resources that exist within the Creek's ecosystem – its surface waters, its sediments, and its tidal wetlands, among others. Finally, the Creek's pollution may also pose a threat to the overall water quality of New York Harbor.

II. The RCRA Solid or Hazardous Wastes Disposed of by Exxon, Chevron, BP, Phelps Dodge, and Keyspan Created an Imminent and Substantial Endangerment

Each of the companies noticed here by the State have contributed or are contributing solid or hazardous wastes to the current contamination of the Creek's waters and sediments and adjacent land areas, and therefore bear responsibility for creating environmental conditions that may pose an imminent and substantial endangerment to public health and the environment, all in violation of RCRA.

A. Exxon

Since at least the early 1900's, if not earlier, Exxon and its predecessors, including the Standard Oil Company, the Standard Oil Company of New York, and Mobil Oil Company, have owned and operated petroleum refinery and storage facilities – at times known as the Brooklyn Terminal – located in the Greenpoint neighborhood of Brooklyn. At one point, these facilities included a large tank farm property (now a part of the Newtown Creek Wastewater Treatment Plant) and a refinery and storage facility that encompassed all of the land now bounded by North Henry Street, Greenpoint Avenue, Norman Avenue, Apollo Street, and Newtown Creek. Exxon still owns an inactive petroleum storage facility within that area.

During the many decades of Exxon's operation of its Greenpoint petroleum refinery and storage facilities, Exxon spilled, leaked, or otherwise discarded at least seventeen million gallons of various petroleum products and other non-petroleum pollutants from its Greenpoint facilities into the surrounding environment, including into the soils, subsurface soils, groundwater, and the waters and sediments of Newtown Creek. This widespread contamination has formed a massive plume of underground petroleum and other pollutants in the Greenpoint area (the Spill). Vapors from the Spill's pollutants continue to present ongoing health risks to the people of Greenpoint.

Exxon's disposal of solid or hazardous wastes is ongoing as the Spill's pollutants continue to move into the Creek through seeps in shoreline bulkheads located at the Peerless

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Importers and Steel Equities properties¹ and, on information and belief, through contaminated groundwater flowing into the Creek. Exxon also continues to dispose of solid or hazardous wastes through its on-site and off-site free product recovery systems, which are currently discharging into the Creek solid or hazardous wastes not authorized by any federal or state permit or equivalency.

Many, if not all, of the solid or hazardous wastes disposed of, or being disposed of, by Exxon have been detected in the recent sampling of the Creek's surface waters and sediments, *see* the attached Exhibit A, and have also been detected in recent groundwater sampling in the Greenpoint area, *see* the attached Exhibit B. Creek sediment samples also found petroleum - as much as 10% of the dry weight of the sample.

B. Chevron

Chevron, and its predecessors, including Paragon Oil Company and Texaco Inc., owned and operated a petroleum storage facility that was located in Greenpoint, Brooklyn at the corner of Bridgewater Street and Meeker Avenue and which bordered the Creek. During the course of its ownership and operation of this facility, Chevron and its predecessors spilled, released, and otherwise disposed of petroleum and other contaminants into the environment in the area of its facility, which contaminants entered the subsurface, soils, and groundwater, as well as the surface waters and sediments of the Creek and its tributaries. For years, and continuing to the present, contaminants from these releases have discharged into the adjacent Creek through gaps, cracks, and fissures in a bulkhead along the Creek at the site of the facility, which is now known as the Peerless Importers property. These bulkhead discharges are ongoing.

Many, if not all, of the solid or hazardous wastes disposed of, or being disposed of, by Chevron have been detected in the recent sampling of the Creek's surface waters and sediments, *see* the attached Exhibit A, and have also been detected in recent groundwater sampling in the Greenpoint area, *see* the attached Exhibit B. Creek sediment samples also found petroleum - as much as 10% of the dry weight of the sample.

C. BP

BP, including a predecessor, Amoco, owns and operates the BP Amoco Bulk Storage Facility located at Norman Avenue and Apollo Street in Greenpoint, Brooklyn, adjacent to the Creek. During the course of its ownership and operation of the facility, BP spilled, released, and otherwise disposed of petroleum and other pollutants into the environment in the area of its facility and those pollutants entered the subsurface, soils, and groundwater, as well as the surface waters and sediments of the Creek and its tributaries. Petroleum and other pollutants from the

¹ The Peerless Importers property is located at 26 Bridgewater Street and Meeker Avenue (Block #2666, Lots 1, 52, 125), and the Steel Equities property is located at 100 and 120 Apollo Street and Bridgewater Street (Block #2666, Lots 101 and 201).

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BP facility have migrated through the subsurface and merged with contaminants from Exxon's Spill, eventually discharging into the Creek's waters and sediments. Exxon, Chevron, and BP together will hereafter be referred to as the "oil companies."

Many, if not all, of the solid or hazardous wastes disposed of, or being disposed of, by BP have been detected in the recent sampling of the Creek's surface waters and sediments, see the attached Exhibit A, and have also been detected in recent groundwater sampling in the Greenpoint area, see the attached Exhibit B. Creek sediment samples also found petroleum - as much as 10% of the dry weight of the sample.

D. Phelps Dodge

Phelps Dodge operated a copper smelting plant on its Laurel Hill site, located on the north bank of the Creek downstream of Maspeth Creek and east of the Kosciuszko Bridge. This site is a State Superfund Site listed on the State's Registry of Inactive Hazardous Waste Disposal Sites as Site No. 241002. The primary contaminants of concern at the PD site are heavy metals, including cadmium, chromium, copper, lead, and mercury, as well as PAHs and PCBs. Past discharges, spills, leaks, and disposal from the facility's operation caused sediment contamination in the Creek and those sediments serve as continuing sources of contaminant releases. Many, if not all, of the solid or hazardous wastes disposed of by PD have been detected in recent sampling of the Creek's surface waters and sediments. See Exhibit A, attached hereto.

E. Keyspan

Keyspan Corporation, and its predecessors, are past and present owners and operators of several manufactured gas plant (MGP) facilities along Newtown Creek. Specifically, Keyspan has owned and operated three sites: (1) the Greenpoint Energy Center site, a manufactured gas plant (MGP) located at 287 Maspeth Avenue, Brooklyn, New York and adjacent to the Creek; (2) the Equity Works MGP site, located at Maspeth Avenue, Brooklyn and in close proximity to the Creek; and (3) the Scholes Street Holder Station site, located at 338 and 350 Scholes Street, Brooklyn, New York and also in close proximity to the Creek.

Keyspan's operations at these three facilities resulted in the release into the environment of a wide variety of contaminants, including arsenic, metals, PCBs, petroleum products, VOCs, chlorinated solvents, SVOCs, and ferro-ferric cyanide complexes. These solid or hazardous wastes have entered the soil, subsurface, and groundwater at Keyspan's facilities and, on information and belief, the surface waters and sediments of the Creek. These wastes continue to exist in the Creek's sediments and thus serve as continuing sources of contaminant releases.

Many, if not all, of the solid or hazardous wastes disposed of, or being disposed of, by Keyspan have been detected in the recent sampling of the Creek's surface waters and sediments.

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See Exhibit A, attached hereto. Many, if not all, have also been detected in soil sampling at the Keyspan Greenpoint Energy Center site. See Exhibit C, attached hereto.

III. The State of New York's Intention to File Suit

In light of all the facts described above, the oil companies, PD, and Keyspan, as past or present generators, transporters, or owners and operators of facilities where solid or hazardous wastes were treated, stored, or disposed of, have contributed, or are contributing, to the past or present handling, storage, treatment, transportation, or disposal of solid and of hazardous wastes in such a way as to have created an imminent and substantial endangerment at their facilities, as well as in the Creek and its surrounding environs. Pursuant to the RCRA citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), the State accordingly intends to sue these companies for "contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." RCRA defines disposal as a "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." See 42 U.S.C. § 6903(3).

The oil companies, PD, and Keyspan are in violation of RCRA's imminent and substantial endangerment provision until such time as they cease to dispose of pollutants, and until such pollutants are remediated by them. At the close of the 90-day notice period, the State intends to file a citizen suit against the oil companies, PD, and Keyspan pursuant to 42 U.S.C. § 6972(a)(1)(B). The State intends to seek all available injunctive relief for the companies' creation of an imminent and substantial endangerment in violation of RCRA, as well as the State's legal fees and costs.

The claims set forth above are not exclusive. This Notice of Intent to Sue is sent without waiver of or any prejudice to the rights of the State of New York, the Attorney General of the State of New York, or any other agency or officer of the State of New York to advance any additional or further legal and/or factual claims, including any federal claim for relief and/or state law and/or common law cause of action based upon information or facts that are now known or may become known in the future.


This Notice of Intent to Sue sufficiently states grounds for filing suit. During the 90-day RCRA notice period, the State will be willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue such discussions in the absence of litigation, please initiate those discussions within ten (10) days of receiving this notice so that a meeting can be arranged and settlement negotiations may be completed before the end of the notice period. If you wish to discuss these matters further, please do not hesitate to contact the undersigned. At the close of the 90-day notice period, unless significant progress is made in remedying these

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violations, the State intends to file a citizen suit against the oil companies, PD, and Keyspan under 42 U.S.C. §6972(a)(1)(B).

Sincerely,

ANDREW M. CUOMO
Attorney General of the State of New York

By: 
ROBERT EMMET HERNAN
Assistant Attorney General
New York State Office of the Attorney General
Environmental Protection Bureau, 26th Floor
120 Broadway
New York, New York 10271
Tel: (212) 416-8461
Fax: (212) 416-6007
robert.hernan@oag.state.ny.us

Cc: (By Certified Mail)

Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Alan J. Steinberg, Regional Administrator
U.S. Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1010

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Alison Crocker, Acting General Counsel
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1500

Marie McGowan, Esq.
Counsel, Environmental Law
Exxon Mobil Corporation
3225 Gallows Road, 3D2134
Fairfax, Virginia 22037

James Hamula, Esq.
Gallagher & Kennedy, P.A.
2575 E. Camelback Road
Phoenix, Arizona 85016

Robert Abrams, Esq.
Stroock & Stroock & Lavan
180 Maiden Lane
New York, New York 10038-4982

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EXHIBIT A		
POLLUTANTS IN NEWTOWN CREEK		
SEDIMENTS AND SURFACE WATER		
MARCH, JULY 2004		
	SEDIMENT	SURFACE WATER
METALS		
Aluminum	X	X
Antimony	X	X
Arsenic	X	
Barium	X	X
Cadmium	X	
Calcium	X	X
Chromium	X	
Cobalt	X	
Copper	X	X
Iron	X	X
Lead	X	X
Magnesium	X	X
Manganese	X	X
Mercury	X	
Nickel	X	
Potassium	X	X
Selenium	X	
Sodium	X	X
Vanadium	X	
Zinc	X	X
PCBs (Polychlorinated		
Biphenyls)		
Aroclor 1242	X	
Aroclor 1254	X	
Aroclor 1260	X	
PESTICIDES		
4,4-DDD	X	
4,4-DDE	X	X
4,4-DDT	X	X
Adrin		X
Alpha-chlordane	X	
Beta-BHC		X
Gamma-BHC (Undane)		X
Gamma-chlordane	X	
Dieldrin	X	
Endosulfan		X
Endrin Aldehyde		X
Gamma-BHC		X
Heptachlor epoxide		X
PAHs		
Acenaphthene	X	X
Anthracene	X	
Benzo(a)anthracene	X	
Benzo(a)pyrene	X	
Benzo(b)fluoranthene	X	
Benzo(g,h,i)perylene	X	
Benzo(k)fluoranthene	X	
Chrysene	X	
Dibenzo(a,h)anthracene	X	
Fluoranthene	X	
Fluorene	X	
Indeno(1,2,3)pyrene	X	

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Naphthalene	X	X
Phenanthrene	X	
Pyrene	X	
SVOCs (Semi-volatile Organic Compounds)		
Acenaphthylene	X	
Acetophenone	X	X
Benzaldehyde	X	
biphenyl	X	
Bis(2-Ethylhexyl)phthalate	X	
Butylbenzylphthalate	X	
Obenzofuran	X	
2,4-Dichlorophenol		X
Di-n-butylphthalate	X	
Di-n-octylphthalate	X	
2-Methylnaphthalene	X	
4-Methylphenol	X	
2-Methylnaphthalene	X	
VOCs (Volatile Organic Compounds)		
1,2-Dichlorobenzene	X	
1,4-Dichlorobenzene	X	X
2-Butanone(MEK)	X	
Acetone	X	
Benzene	X	X
Carbon Disulfide	X	
Chloroform		X
cis-1,2-Dichloroethane		X
Cyclohexane	X	
Ethylbenzene	X	
Isopropylbenzene	X	
Methyl acetate		X
Methyl cyclohexane	X	
Methyl Tert Butyl Ether	X	X
Methylene chloride	X	X
Tetrachloroethane	X	
Toluene	X	
Trichloroethylene	X	X
Xylene	X	X
DIOXINS AND FURANS		
Octachlorodibenzofuran	X	
Octachlorodibenzo-p-dioxin	X	
Hectachlorodibenzofuran	X	
Heptachlorodibenzo-p-dioxin	X	
Pentachlorodibenzofuran	X	
Pentachlorodibenzo-p-dioxin	X	
Tetrachlorodibenzofuran	X	
Tetrachlorodibenzo-p-dioxin	X	
OTHERS		
Ammonia		X
Bromide		X
Chloride		X
Nitrite/Nitrate		X
Sulfate		X
Total Dissolved Solids		X
Total Suspended Solids		X

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EXHIBIT B POLLUTANTS FOUND IN GROUNDWATER

benzene
toluene
ethylbenzene
xylenes
methyl tert butyl ether (MTBE)
naphthalene
1,2,4-trimethylbenzene
1,3,5-trimethylbenzene
n-butylbenzene
isopropylbenzene
n-propylbenzene
p-isopropyltoluene
sec-butylbenzene
naphthalene
acenaphthene
fluorene
phenanthrene
anthracene
fluoranthene
pyrene
benzo(a)anthracene
chrysene
benzo(b)fluoranthene
benzo(k)fluoranthene
benzo(a)pyrene
indeno(1,2,3-cd)pyrene
dibenz(a,h)anthracene
benzo(g,h,i)perylene
t-butyl methyl ether
t-butyl alcohol
chloroform
1,1-dichloroethane
cis-1,2-dichloroethene
tetrachloroethene
trichloroethene
vinyl chloride
bis(2-ethylhexyl)phthalate
sec-octylbenzene
cyclonaxane
1,2,4-trichlorobenzene
benzo(b)pyrene
2-methylnaphthalene
acetone
tert-butylbenzene
chlorobenzene
heptane

Appendix D

EXHIBIT C POLLUTANTS FOUND IN SOILS AT KEYSpan SITE MARCH 2004

acetone
2-butanone
benzene
toluene
ethylbenzene
xylenes
tetrachloroethene
styrene
naphthalene
2-methylnaphthalene
acenaphthylene
acenaphthene
dibenzofuran
fluorene
4,6-dinitro-2-methylphenol
phenanthrene
anthracene
carbazole
fluoranthene
pyrene
benzo(a)anthracene
chrysene
bis(2-ethylhexyl)phthalate
benzo(b)fluoranthene
benzo(k)fluoranthene
benzo(a)pyrene
indeno(1,2,3-cd)pyrene
dibenz(a,h)perylene
arsenic
barium
cadmium
chromium
cyanide
lead
mercury
selenium
silver

Appendix E

E. Analysis of the Hazard Ranking System Score for Newtown Creek



Review Comments on the Newtown Creek National Priorities List Nomination

HydroQual, Inc.
December 10, 2009

Executive Summary

- A technical review of the United States Environmental Protection Agency's (EPA) documentation supporting the nomination of Newtown Creek [Brooklyn/Queens, NY] (or Creek) to the National Priorities List (NPL) has been completed.
- The Hazard Ranking System (HRS) score is a screening tool used to determine the relative contamination of a site based on a reference site. Since hazardous materials testing results are available for certain areas of Newtown Creek, it is appropriate to consider these data in addition to the HRS on HRS score methodology.
- The HRS score developed for Newtown Creek omits obvious sources for the contamination in Newtown Creek. It is clear from the nature and location of contamination in Newtown Creek sediments that several upland sources are major contributors. Sediment contaminant concentration measurements are available in a number of reports, including the Phelps Dodge Operable Unit 6 Remedial Investigation, the Newtown Creek-Greenpoint Oil Spill Study, the Keyspan Interim Remedial Action Workplan, the Quanta Resources Proposed Remedial Action Plan, the BCF DMA Report, and others referenced as support documents to the EPA HRS.
- Actual hazardous materials testing results in portions of Newtown Creek sediments performed by the City have determined that not all of the Creek's sediments may be classified as hazardous waste. However, the EPA HRS score calculations include a hazardous waste quantity factor which is based on the presumption that all Newtown Creek sediments meet the definition of hazardous waste.
- While Newtown Creek sediments are indeed contaminated with hazardous substances, they do not meet the definition of hazardous waste based on the hazardous materials testing results for portions of the Creek. In order for sediments to be a hazardous waste, the sediments must have contaminant concentrations above established threshold levels. Measured contaminant concentrations in portions of Newtown Creek were below the threshold levels.

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- The EPA calculation for hazardous waste quantity factor involves the use of a divisor of 2.5. EPA's use of the 2.5 divisor suggests Newtown Creek sediments are a source of category "Other". Alternatively, the divisor for the "Soil" source category is 2500. EPA's choice of "Other" for Newtown Creek sediments rather than "Soil" increases the estimated amount of hazardous substances one thousand times. In reality, Newtown Creek sediments probably fall somewhere between the "Other" and "Soil" source categories.
- EPA considers the sediments underlying Newtown Creek as a release site based on differences in measured contaminant concentrations in the sediments of Newtown Creek and a local reference site, the Adantic Basin [Brooklyn, NY]. As explained in greater detail below in Section 2.2.2.1, Likelihood of Release, this biases Newtown Creek's score and drives the recommendation to place Newtown Creek on the NPL.
- Furthermore, differences in sediment contaminant concentrations between Newtown Creek and the Adantic Basin may be partially explained by differences in sediment organic carbon content.
- Newtown Creek sediments were considered by EPA as an unallocated source and were also evaluated for volume and area measures. This dual use of the Newtown Creek sediments is in contradiction with EPA's HRS guidance. EPA's HRS guidance specifically states, "Do not evaluate the volume and areas measures...if the source is the unallocated source...."
- Given that the Newtown Creek is designated by the State of New York as a Class SD water body suitable for fish survival, a Sensitive Environments Rating Factor of 5 for "state designated areas for protection or maintenance of aquatic life" is more appropriate for Newtown Creek than the 100 EPA assigned.
- Current Combined Sewer Overflow (CSO) volumes referenced in the HRS documentation are overestimated and CSOs are more accurately characterized as potentially conveying contaminants. CSOs do not produce contaminants.

Executive Summary Conclusion

- Technical arguments are presented for a lower Hazard Ranking System (HRS) score for Newton Creek than calculated by EPA. A lower HRS score could be established on the basis of sensitive environment and hazardous waste quantity factor considerations only. It would not be necessary to adjust more than two elements of the HRS score calculation for Newtown Creek to produce an overall lower score. While calculations of a lower HRS score for Newtown Creek may have NPL implications, the calculations do not imply that contamination is not present in Newtown Creek.

1.0 Introduction

Newtown Creek has recently received an HRS score as part of an evaluation of the site for potential addition to the EPA's NPL under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹ The following provides a technical review of the EPA's derivation of the HRS score.

¹ EPA, HRS Documentation Record, September, 2009.

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2.0 HRS Score Review

Two types of comments have been developed based upon review of the HRS Score for Newtown Creek: general comments on the supporting information presented in the documentation and specific comments on components of the score. The specific comments are presented in a sequential order following the way the score was developed. As will be described below, technical concerns regarding the Newtown Creek HRS score are related to the hazardous waste quantity factor EPA used in the scoring and EPA's comparison of Newtown Creek and Atlantic Basin contaminant concentrations on a bulk sediment basis to define a likelihood of release for the Newtown Creek site.

Concerns related to the hazardous waste quantity factor used in the scoring have several detailed technical nuances but are largely related to EPA's theoretical determination that the sediments of Newtown Creek are hazardous waste. Measurements made by the City refute the theoretical determination at least for portions of Newtown Creek. The hazardous waste quantity factor is described in Section 2.2.2.3., Waste Characteristics.

Scoring to place Newtown Creek on the NPL was driven by EPA considering the sediments underlying Newtown Creek as a release based on differences in measured contaminant concentrations in the sediments of Newtown Creek and the Atlantic Basin. Comparisons were done on a bulk sediment basis and did not account for physical differences between the sediments at the two locations. This technical concern is described in the Section 2.1, General Comments on the Newtown Creek HRS Documentation Record and in Section 2.2.2.1, Likelihood of Release. Further, the upland sources, rather than the sediments of Newtown Creek, represent the true source.

2.1 General Comments on the HRS Documentation Record

Notes on Sample Similarity – Higher total organic carbon (TOC) concentrations in the sediment bed are reported for Newtown Creek than for the Atlantic Basin.¹ For comparisons of measured contaminant concentrations between the two sites, contaminant concentrations should have been organic carbon normalized. The comparisons of sediment concentrations in the Newtown Creek and the Atlantic Basin samples performed by EPA on a dry weight sediment basis is inappropriate given the differences in organic carbon content of the sediments. Many of the contaminants considered (e.g., polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs)) are known to preferentially bind to sediments with high organic carbon content. A better and more accurate comparison would involve comparing contaminant concentrations on a per mass organic carbon basis between the two sites. "When normalized for organic carbon, concentrations of a contaminant in different sediment samples are comparable."²

The question of whether the Atlantic Basin sediments appear cleaner than Newtown Creek sediments because they received less source releases of contaminants or because they don't have the capacity to strongly bind and retain contaminants remains unanswered by the analysis underlying the HRS review. The definition being used for an observed release is significance above background.

² NYSDEC, Technical Guidance for Screening Contaminated Sediments, January 25, 1999, page 6.

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Significance above background will be different on a bulk sediment basis and on an organic carbon normalized basis.

Here is a random numerical example to illustrate the point: Sediment X has contaminant concentration of 10 mg/kg dry weight. Sediment Y has contaminant concentration of 2 mg/kg dry weight. Strictly on the basis of dry weight, sediment X appears to be more contaminated. Suppose, the organic carbon content of sediment X was 5% and the organic carbon content of sediment Y was 1%. Sediment X would have a contaminant concentration of 200 mg/kg organic carbon and Sediment Y would also have a contaminant concentration of 200 mg/kg organic carbon. On a mass organic carbon basis, sediments X and Y are equally contaminated.

Here is a specific case selected from the EPA data at random where organic carbon normalization would matter in the conclusion reached:

	Measured Pyrene Concentrations	
	Dry Weight (ug/kg)	Carbon Normalized (ug/kg)
Atlantic Basin Sample NC-SD111A*	550	17,200
Newtown Creek Sample NC-SD71A	1400	7,400
Conclusion	Newtown Creek more contaminated than Atlantic Basin	Newtown Creek less contaminated than Atlantic Basin
*The Atlantic Basin measurements include an EPA adjustment factor or use of a sample quantitation limit (SQL).		

Another point is that the EPA HRS Documentation implies that high TOC levels are indicative of anthropogenic sources such as CSOs and the absence of high TOC indicates absence of hazardous sources. This logic is somewhat flawed in that while a CSO might very well be a source of TOC it is not necessarily a source of hazardous material. Similarly, a source of hazardous material (e.g., a transformer manufacturer) might not be a source of TOC. Further, TOC concentrations in the vicinity of a CSO outfall could be elevated for reasons other than the CSO (e.g., soil leaching, etc.).

All of the non-metal data (i.e., hydrophobic organic contaminants) presented in Tables 1 to 4 should be analyzed on an organic carbon normalized basis. This would demonstrate whether or not the release definition between Newtown Creek and the Atlantic Basin can be met after differences in sediment organic carbon content are accounted for. Metals do not partition appreciably to organic carbon but rather form complexes with sulfides, chlorides, and other anions.

Observed Release Attribution – EPA HRS Documentation states that “CSOs and storm water runoff are major contributors of PCBs to the Harbor, with a variety of contaminated properties or facilities as the likely contributors to those wastestreams”.³ However, measured data and modeling

³ Cited in EPA, HRS Documentation Record, September, 2009, page 38 [Ref. 57, p.18]

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results from the Contamination Assessment and Reduction Project (CARP)⁴ demonstrate that current CSO inputs of contaminants to the Harbor are small relative to other current sources. For example, the sum of four major PCB homologs coming from CSOs is only 7% of the load entering the Harbor. CARP results are similar for other contaminants such as dioxins (2.6%), furans (5.8%), and cadmium (7%). The CARP modeling results also show that CSOs will contribute little to ambient concentrations of contaminants in the water, sediment, and biota of the Harbor in the future if current CSO contaminant loadings continue for many years. CARP was a cooperative effort undertaken by New York and New Jersey to reduce toxic chemicals in the New York/New Jersey Harbor. CARP was recommended by the Harbor Estuary Program (HEP) in the Comprehensive Conservation and Management Plan (CCMP).

CSOs convey wastewater and stormwater runoff when flow volume exceeds the capacity of the sewer and wastewater treatment system. EPA's HRS Documentation further states, "Metals (including copper), PCBs, SVOCs [semi-volatile organic compounds], and VOCs [volatile organic compounds] have all been detected at concentrations exceeding surface water quality criteria in CSO and storm water discharges to Newtown Creek"⁵. There are no surface water quality criteria applicable to CSO and storm water discharges. Water quality criteria⁶ are applied to surface waters, not effluents.

Human Food Chain Threat – Waste Characteristics (and other document sections) – While it is agreed that the water of Newtown Creek is indeed brackish water, measured salinity in Newtown Creek (i.e., less than 10 parts per thousand (ppt))⁷ is lower than the 18.5 to 22.8 ppt range EPA identified.⁸ The brackish nature of Newtown Creek and the wide range of salinity observed in the Creek are not ideal for HRS evaluation because factors used in the HRS scoring methods are specific to bioaccumulation and toxicity in either fresh water or salt water. Per HRS scoring protocols, any fisheries being evaluated in brackish water are assigned the higher of the fresh water and salt water food chain toxicity-persistence-bioaccumulation potential factor values.⁹ Whether the higher value occurs for salt water or for fresh water varies by contaminant. Since the HRS protocols for brackish water require selecting the higher value for each contaminant, Newtown Creek is scored higher than if it were scored as entirely fresh water or as entirely salt water. The contaminants for which there are HRS scoring differences between fresh water and salt water include pyrene, silver, benzo(a)pyrene, and cadmium. Dibenz(a,h)anthracene and PCBs are scored the same in both salt and fresh water.

Tables 1 through 4 - While the text of the HRS Documentation¹ indicates that EPA collected sediment samples from Newtown Creek and project-specific background samples from the nearby

⁴ CARP Matrix available at www.carpweb.org

⁵ Cited in EPA, HRS Documentation Record, September, 2009, page 38 [Ref 11, p.23-24]

⁶ Section 304(a)(1) of the Clean Water Act

⁷ Greeley and Hansen, LLC / Hazen and Sawyer, P.C. / O'Brien & Gere, Inc. (LTCP-JV). 2007. City-Wide Long-Term CSO Control Planning, Receiving Water Quality Modeling Report, Volume 11 Newtown Creek Draft. Prepared for the City of New York Department of Environmental Protection, Bureau of Engineering Design & Construction. June 2007.

⁸ Cited in EPA, HRS Documentation Record, September, 2009, page 45 [Ref 52, p. 112]

⁹ Cited in EPA, HRS Documentation Record, September, 2009, page 45 [Ref 1, p.51617]

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Atlantic Basin, Tables 1 through 4 in the HRS Documentation identify the samples as "Observed Release Concentrations." The labeling of Tables 1 through 4 is very confusing and misleading. Observed contaminant concentrations in the sediment bed are not necessarily observed releases as labeling for Tables 1 through 4 implies. This logic introduces the presumption that the sediment bed is a release independent of completing a comparison to background concentrations. Considering the sediment bed as a release is in contradiction with the fact that although the Creek rises and falls with the tide, it is mostly stagnant.¹⁰ In stagnant waters, the sediment bed and any associated contaminants has a low probability of movement.

2.2 Specific Comments on Components of the HRS Score

The EPA adopted HRS to determine priorities among releases or potential releases within the United States for the purpose of taking remedial action at hazardous waste sites. The HRS scoring system is the primary means for the EPA to decide whether to place a site on the NPL.¹¹

The Superfund Amendments and Reauthorization Act of 1986 (SARA) required several changes to the criteria to derive a HRS score.¹² SARA required the EPA to amend the HRS to assure "to the maximum extent feasible, that the hazard ranking system accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review." SARA also included surface waters used for recreation or drinking water and requirement for criteria to assess actual or potential threats through ambient air and through the human food chain.¹³ The final HRS rule reflects SARA updates and changes reflective of comments submitted by many commentators.¹⁴

2.2.1 Hazard Ranking System Score

The HRS site score (S) is derived from evaluations of four pathways:

- Groundwater Migration, S_{gw} ,
- Surface Water Migration, S_{sw} ,
- Soil Exposure, S_s ,
- Air Migration, S_a .

Each pathway score is the product of three factor categories; 1) Likelihood of Release, 2) Waste Characteristics, and 3) Targets. Within each of the three factor categories is a set of factors that assign numerical values that are combined to give the respective category factor. Once each of the individual pathway scores are derived, they are then combined using a root mean square equation to derive the overall HRS site score:

$$S = \sqrt{\frac{S_{gw}^2 + S_{sw}^2 + S_s^2 + S_a^2}{4}}$$

¹⁰ Cited in EPA, HRS Documentation Record, September, 2009 [Ref. 6, p.2; 8, p.9]

¹¹ 40 CFR 300 Appendix A, Summary Section

¹² EPA, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 105(a)(8)(A).

¹³ 40 CFR 300 Appendix A, Section I, Background.

¹⁴ 40 CFR 300 Appendix A, Section I, Background.

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EPA derived the HRS score for the Newtown Creek considering only the surface water pathway, S_{sw} . The HRS Document Record¹⁵ notes that the groundwater, soil, and air pathways were not scored and indicated the following for each of these pathways:

- Ground Water (S_{gw}): There are no drinking water wells located within four miles of the site, and the pathway does not contribute significantly to the site score.
- Soil Exposure (S_s): Not considered in scoring the site because there is not sufficient information and because this pathway does not contribute significantly to the site score based on the available data.
- Air (S_a): Not scored because there is no documentation of an observed release and because this pathway does not contribute significantly to the site score.

EPA's decision not to score these pathways is technically supportable. The absence of water supply; the low permeability of the surficial sediment deposits which limit the groundwater pathway; the organic rich nature of the upper sediments which help to limit migration potential via groundwater; and the virtually absent potential for air impacts from this water body, all indicate that these pathways are irrelevant. In addition, in scoring the Creek, while upland sources, such as soils, may have contributed to contamination in the Creek sediments, such upland areas are not part and parcel of an NPL designation for the Creek. If upland areas are to be considered, they should be viewed in the context of separate upland sites. For all of these reasons, the groundwater, soil, and air pathways are not considered further.

2.2.2 Surface Water Pathway Evaluation

As described in Section 2.2.1, EPA used only the Surface Water Migration pathway score, S_{sw} , to develop the HRS. Within the Surface Water Migration pathway, EPA used the human food chain and the environmental "threats" for the scoring. Drinking water was not considered because there are no drinking water intakes in the Newtown Creek or within 15 miles downstream.

Consistent with these EPA scoring decisions, EPA's scoring evaluations of Likelihood of Release, Waste Characteristics, and Targets for each of the surface water human food chain and environmental "threat" pathways are evaluated below.

2.2.2.1 Likelihood of Release

The likelihood of release is established by either determining an Observed Release value or a Potential for Release. If the criteria established in the Federal Register are met, the Observed Release is assigned the maximum value of 550 and the Potential for Release is not evaluated.

¹⁵ EPA, HRS Documentation Record, September, 2009, review cover sheet

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Observed Releases are categorized by comparisons to background results. In the case of Newtown Creek, the Observed Release is based on sediment measurements taken in February to April 2009 by EPA in the Newtown Creek and background samples from the nearby Atlantic Basin.¹⁶

There are two criteria for determining if there is an Observed Release at the site being scored, depending upon whether or not a constituent is detected at the background location. If a constituent is detected at the background location, i.e., Atlantic Basin, and if the constituent concentration at the site, i.e., Newtown Creek, is three times greater than the maximum background concentration or adjusted background concentration in the Atlantic Basin, then it is deemed that a release is observed. If a constituent is measured as non-detect at the background location, i.e., Atlantic Basin, and if the concentration in Newtown Creek is greater than the sample quantitation limit (SQL) for the Atlantic Basin, then it is deemed that a release is observed.

Based on these criteria, several constituents have been listed as having an Observed Release on page 43 of the Newtown Creek HRS Document¹⁷. For metals and VOCs, there are parameters that are listed as having an Observed Release based on both detect and non-detect criteria. For the SVOCs and PCBs, all of the observed releases are based on exceeding the SQL, i.e., the non-detect criterion, since the background samples are non-detect.

Although correctly calculated according to EPA's HRS scoring guidelines, it seems arbitrary that sample measurements higher than the SQL or three times background concentration levels should define an observed contaminant release. The factor of three and the SQL have no relationship to an environmental or human health impact. EPA has established draft sediment quality guidelines on a contaminant per mass organic carbon basis which could instead be used to assess the relevance to an ecological threat represented by contaminant concentrations at Newtown Creek.¹⁸ The draft sediment quality guidelines, unlike the higher than the SQL and three times background metrics used in HRS score, are tied to ecological effects. Unfortunately, the draft sediment quality guidelines are available for only a limited number of contaminants and are not mentioned in HRS scoring guidance. It is noted that NYSDEC guidance for determining cleanup levels recommends adjusting site soil cleanup objectives based on soil organic carbon content.¹⁹

The concept of three times background concentration makes more sense for comparing an immediately upstream location to a contiguous site in that it implies a constituent was necessarily introduced in the immediate vicinity to produce a factor of three concentration increase. Since the Atlantic Basin is disconnected from Newtown Creek, a factor of three or more difference in concentration doesn't prove a release directly to Newtown Creek, just a release somewhere that didn't reach the Atlantic Basin or was different than that reaching the Atlantic Basin. The attribution isn't as apparent when the background site and scored site are disconnected. Furthermore, as described above in Section 2.1, difference in organic carbon between Newtown

¹⁶ EPA, HRS Documentation Record, September 2009, Section 2.4.1.

¹⁷ EPA, HRS Documentation Record, September 2009, Section 4.1.2.1.1.

¹⁸ EPA, *The Incidence and Severity of Sediment Contamination in Surface Waters of the United States, National Sediment Quality Survey: Second Edition*, Table B-1. EPA-823-R-04-007.

¹⁹ NYSDEC, TAGM 4046, January 24, 1994

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Creek and the Adantic Basin could easily eliminate the factor of three differences appearing as an artifact of dry weight based comparisons of concentrations.

Nonetheless, per EPA's HRS scoring guidance, since measured contaminant concentrations in the Newtown Creek were found to be either three times higher than the background measurement or higher than the SQL, the Observed Release score was assigned the maximum value of 550. The Newtown Creek sediments are presumably contaminated as a result of historical releases directly to the Creek, especially considering the historical industrial character of the surrounding area. Consequently, assigning the value of 550 for an observed release appears to be appropriate within the context of the definition of an Observed Release.

Further complicating the determination of a release, much of the data, especially for cadmium and other metals, used to determine releases were laboratory estimates, i.e., "J-flagged", rather than true laboratory measurements. While EPA followed accepted protocols for using "J-flagged" data and attempted to compensate for uncertainty, the release determination is compromised because of the "J-flagged" estimates. Given the importance associated with the HRS score and potential NPL listing, alternative calculations, omitting "J-flagged" estimates, should also be considered by EPA before reaching a final listing conclusion.

2.2.2.2 Targets

The types of targets that are evaluated for the HRS score include individual and population for the human food chain threat and sensitive environments for the environmental threat. Discussion of each of these targets is given below.

2.2.2.2.1 Food Chain Individual Factor Value

This factor has been assigned a value of 45 based on documentation of the presence of people fishing in the Creek [Ref 1, HRS Doc].²⁰ This value has been assigned given the criteria of 0 to 100 pounds production per year for human consumption for an individual which is based on sightings of people fishing for consumption in Newtown Creek at Dutch Kills and at the end of Manhattan Avenue in Brooklyn. The EPA's assigned consumption value in the Newtown Creek HRS score is consistent with consumption levels in the New York State Department of Health, 2009-2010 Health Advisories on Eating Sportfish. For the East River, while eating certain fish species is not allowed, other fish meals²¹ can be eaten either weekly or monthly, allowing roughly 32 lbs. per year. In that sense, the assigned factor value of 45 appears reasonable. However, the Health Advisory suggests human consumption is safe at 32 lbs per year from the East River, roughly the same levels (i.e., 0 to 100 lbs) scored in the HRS for Newtown Creek which is within the East River. The HRS does not reflect that the risk from this pathway has been evaluated and addressed by New York State. The State Health Advisory is based upon more criteria than the HRS, including testing of fish. There appears to be a contradiction between the safety the State Health Advisory implies and the risk scored in the HRS.

2.2.2.2.2 Population Factor Value

²⁰ EPA, HRS Documentation Record, September 2009, Section 4.1.1.1.

²¹ A fish meal is equal to 1/2 lb of fish.

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The population factor of 0.0300003 is a minimum value that is consistent with assigning factors based on minimum food chain production of 0 to 100 lbs per year for consumption and measured data from the February to April 2009 data set.

In general the assumptions made to arrive at the final Target value of 45.0300003 are considered appropriate, except as related to the protectiveness of the health advisory. If considered, the protectiveness of the health advisory could obviate the pathway entirely. Nonetheless, if the basic HRS assumptions are used, then the final Target value is appropriate.

2.2.2.2.3 Sensitive Environments

The environmental threat Sensitive Environments target applies a rating factor based on classification of the waterbody. The New York/New Jersey (NY/NJ) Harbor Estuary is part of the National Estuary Program and is identified as a sensitive area. Because Newtown Creek is located within the NY/NJ Harbor Estuary, the USEPA has assigned it the highest "Sensitive Environments Rating Factor" of 100.²²

EPA's HRS training materials indicate that "For listed sensitive environments, potential contamination is established if no portion of the sensitive environment falls within an area that meets the criteria for an observed release."²³ Since waters of the NY/NJ Harbor Estuary are a sensitive area and include observed releases (there are a number of Superfund sites within the NY/NJ Harbor Estuary), potential contamination for a sensitive environment cannot be established. A site specific, rather than a Harbor-wide, Sensitive Environments Rating Factor is more appropriate for Newtown Creek. The Newtown Creek 2007 Waterbody/Watershed Facility Plan Report concludes the following:²⁴

- There are no Outstanding National Resource Waters, National Marine Sanctuaries, public drinking water intakes or their designated protection areas, or shellfish beds within the Newtown Creek waterbody or the East River.
- The Newtown Creek, its tributaries and branches, are not designated by the State of New York for recreational uses. There are no primary contact recreation waters such as bathing beaches in the waterbody.

Given that the Newtown Creek is designated by the State of New York as a Class SD water body suitable for fish survival, the Sensitive Environments Rating Factor of five (5) for "state designated areas for protection or maintenance of aquatic life" is more applicable to Newtown Creek than the 100 EPA assigned. A New York Class SD water body, such as Newtown Creek, is a "state designated area for protection or maintenance of aquatic life". Further, even the East River, the tidal strait which connects Newtown Creek to the NY/NJ Harbor Estuary, is only a Class I water body, suitable for protection and maintenance of aquatic life and secondary contact recreation.

²² EPA, HRS Documentation Record, September 2009, Section 4.1.4.3.1.2.

²³ <http://www.epa.gov/superfund/training/hrstrain/htmain/glossmz.htm>

²⁴ New York City Department of Environmental Protection (NYCDEP). City-Wide Long Term CSO Control Planning Project, Newtown Creek, Waterbody/Watershed Facility Plan Report, Draft, June 2007. [409 pages]

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2.2.2.3 Waste Characteristics

Waste characteristics are evaluated for both the human food chain and environmental threats. The derivation of the waste characterization for each of these threats is similar except that the environmental threat considers all bioconcentration factor (BCF) data and not just BCF data for human food organisms.²⁵ Therefore the following discussion applies to the derivation of the waste characteristics for both the human food chain and environmental threats.

The majority of the assumptions in EPA's HRS scoring process for the Newtown Creek are consistent with the SARA goal: "...to the maximum extent feasible that the hazard ranking system accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review."²⁶ However, the human food chain "threat" includes a component that does not appear to be consistent with this objective, and results in an overstatement of risk or threat. Within the human food chain analysis are the factors of waste characteristics (toxicity factor, persistence factor, bioaccumulation factor) and hazardous waste quantity factor. Of these, it is the hazardous waste quantity factor that results in what appears to be inappropriate HRS scoring.

The other factors may be briefly summarized as follows: The EPA selected benzo(a)pyrene, cadmium, dibenz(a,h)anthracene, and PCBs to assess toxicity/persistence and bioaccumulation. These contaminants are present at levels above background and the selection of these constituents is consistent with the intended approach of the HRS scoring (i.e., select parameters with the highest toxicity, persistence, or bioaccumulation). The factors applied to these constituents are then standardized from established tables.²⁷

The final factor is then the Hazardous Waste Quantity. The HRS scoring methodology provides a hierarchy of four measures to evaluate source hazardous waste quantity:

- Hazardous constituent quantity
- Hazardous wastestream quantity
- Volume
- Area

The HRS scoring system requires that these measures be used in the hierarchy shown and that only the first two measures be used for unallocated sources. Unallocated sources are defined by USEPA in the HRS Final Rule on page 51590 as:

"In evaluating the hazardous waste quantity factor ... consider hazardous substances and hazardous waste streams that cannot be allocated to any specific source to constitute a separate "unallocated source" for the purposes of evaluating only this factor for the three migration pathways."²⁸

²⁵ 40 CFR 300 Appendix A, Section I, Background.

²⁶ 40 CFR 300 Appendix A, Section I, Background.

²⁷ Hazard Ranking System, Final Rule. December 14, 1990. Federal Register, Volume 55, No. 241, pp. 51532-51667.

²⁸ 40 CFR 300, Appendix A, Section I, Background.

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The HRS scoring process defines sources and indicates that sources "...do not include those volumes of air, ground water, surface water, or surface water sediments that have become contaminated by migration, except: in the case of either a ground water plume with no identified source or contaminated surface water sediments with no identified source, the plume or contaminated sediments may be considered a source."²⁹ EPA's scoring identifies the sediments as a source. However, the Newtown Creek HRS scoring documentation indicates:

"The origin of these hazardous substances in the contaminated sediments has not been identified due to the presence of multiple possible sources for each substance. There are numerous routes that contamination can be taken to reach the water body and underlying sediments, including spillage during product shipping and handling, direct disposal and discharge, storm water runoff, and air deposition. As a result, the source(s) of any contamination in any particular location in the Creek cannot be determined."³⁰

This statement avoids recognition that numerous sources can be identified with a high degree of certainty from spill report data and remedial investigations performed on Newtown Creek to date. Clearly, upland sources exist and EPA indicates it has identified "multiple possible sources".³¹ Although, it would not be possible to attribute or allocate all of the contamination to a particular source or sources based on the evidence collected to date. It is suggested that information may be available to identify many sources. Hot spots may be indicative of specific sources. Not pursuing this level of investigation, USEPA considered the sediments the source, and calculated the hazardous waste quantity factor based on the estimated volume of contaminated sediments. However, the HRS scoring process specifically states "Do not evaluate the volume and areas measures...if the source is the unallocated source...."³²

EPA's HRS Guidance Manual indicates that for scoring contaminated sediments when the original source of the contamination is unidentified: "before scoring such sites efforts should be undertaken to identify the original source(s) of contamination. These efforts should be equivalent to those of an expanded SI [Sight Inspection]."³³ It is not clear that the level of detail outlined in EPA's HRS Guidance Manual for an expanded SI was undertaken before developing the Newtown Creek HRS score. The Newtown Creek HRS scoring document does indicate that research on site history and consideration of hazardous substances affiliated with industries of potential concern at the Newtown Creek Site were considered. It is not however indicated that expanded SI efforts to eliminate or confirm other possible sources were completed for Newtown Creek.

The distinction of whether or not the contamination in Newtown Creek sediments is from known/identified or unknown/unidentified sources is fundamentally important to the HRS scoring

²⁹ 40 CFR 300, Appendix A, Section 1.1.

³⁰ EPA, HRS Documentation Record, September 2009, Section Source Identification 4.1.2.1.1.

³¹ EPA, HRS Documentation Record, April 2009, Section Attribution 4.1.2.1.1

³² 40 CFR 300, Appendix A, Section 2.4.2.

³³ EPA HRS Guidance Manual.

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process and whether or not the Newtown Creek sediments can be scored as the source. EPA's HRS Training Manual³⁴ indicates that "Areas of contaminated surface water sediments arising from discharges from known sources are **NOT** sources for purposes of HRS scoring".

EPA's scoring for Newtown Creek also indicated for the hazardous constituent and hazardous wastestream measures that "The information available is not sufficient to evaluate" the Tier A or B source hazardous waste quantity.³⁵ As a consequence, EPA reverted to the volume measure.

In the case of the Newtown Creek, however, the volume measure, apart from being inconsistent with the scoring process, overstates the hazardous waste quantity. Under the volume measure, the total quantity of contaminated sediment was estimated by the USEPA and then a factor of 2.5 (i.e., a divisor, effectively, 40%) is applied to that quantity to estimate the proportion of the contaminated sediments that would be hazardous waste.

Though it is not the intent of the HRS to determine the actual volume of contaminated sediment, consideration of the magnitude of the volume of hazardous waste is given in the factors that comprise the HRS, specifically in the hazardous waste quantity factor. Therefore, an evaluation of the approximate volume of hazardous waste when deriving the hazardous waste quantity factor becomes a relevant part of the overall HRS.

Recognizing that the only likely means by which the sediments would be classified as hazardous is through Toxicity Characteristic Leaching Procedure (TCLP) testing, results of TCLP testing done as part of the Newtown Creek 2007 Waterbody/Watershed Facility Plan Report³⁶ should be considered in classifying the Newtown Creek sediments as hazardous. The Newtown Creek 2007 Waterbody/Watershed Facility Plan Report states that:

"...the sediment cores were analyzed for full Toxicity Characteristic Leaching Procedures (TCLP) and Resource Conservation and Recovery Act (RCRA) characteristics. Based on the NYCDEC Technical & Operational Guidance Series (TOGS) 5.1.9, In-Water and Riparian Management of Sediment and Dredged Material, the results indicate that the Newtown Creek sediments would be classified by the NYSDEC as "Class C – High Contamination (Acute Toxicity to aquatic life)".

The Newtown Creek 2007 Waterbody/Watershed Facility Plan Report goes on to state that:

"Under 6NYCRR Part 371, the summary data from the TCLP analysis shows that tested levels are all below the maximum concentration for exhibiting the characteristic of toxicity. Therefore the sediments in Newtown Creek would not be classified as a hazardous waste."

³⁴ EPA Training Manual, web available in July 2009 at www.epa.gov/superfund/training/hrstrain/htmain/4source.htm

³⁵ EPA, HRS Documentation Record, April 2009, Section Hazardous Constituent Quantity, 2.4.2.1.1 and Hazardous Wastestream Quantity, 2.4.2.1.2.

³⁶ New York City Department of Environmental Protection (NYCDEP). City-Wide Long Term CSO Control Planning Project, Newtown Creek, Waterbody/Watershed Facility Plan Report, Draft, June 2007. [409 pages]

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This indicates that the Creek sediments, although contaminated, would not be considered hazardous waste, thereby indicating that the method of deriving the hazardous waste quantity factor is not realistic in this case. The Newtown Creek sediments do contain constituents defined as hazardous substances under CERCLA.³⁷ However, the mere presence of such substances does not mean that the sediment is hazardous. Rather, the presence of these substances could be evaluated by the HRS system, which EPA did, but should be viewed in the context of hazardous waste and the associated HRS scoring factor of hazardous waste quantity. If one were to assess hazardous waste quantity on the basis of the TCLP results, rather than the mere volume of contaminated sediments, then the hazardous waste quantity factor should correspond with little to no hazardous waste. A more appropriate hazardous waste quantity factor of one (1), assuming that the Newtown Creek sediments would contain little or no material categorized as hazardous waste, is appropriate for the HRS scoring in both the human food chain and environmental threats.

Further, even if TCLP results were dismissed, the hazardous waste quantity calculation for Newtown Creek is dependent upon the divisor selected. For source types "Other" and "Soil" the divisors, and therefore the hazardous waste quantity calculation, are a factor of one thousand different.

In summary, as described and referenced in detail above, the technical concerns with the scoring of Waste Characteristics elements include:

- Designation of Newtown Creek as an unallocated source despite known sources of contamination to Newtown Creek.
- Volume-based scoring of Newtown Creek sediment for hazardous waste quantity when EPA's guidance states this should not be done for an unallocated source.
- Estimation of a large hazardous waste quantity in Newtown Creek when TCLP testing results indicate otherwise.
- The magnitude of the divisor used in estimating the hazardous waste quantity in Newtown Creek.

The HRS defines Newtown Creek as a source based on the assertion that if "...either a ground water plume with no identified source or contaminated surface water sediments with no identified source, the plume or contaminated sediments may be considered a source."³⁸ However, this is not the case for Newtown Creek where numerous sources have been identified.

EPA states there are too many sources to associate contamination at a particular location with a particular source. HydroQual agrees there are multiple sources, past and present, but suggests there

³⁷ EPA Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 101(14).

³⁸ 40 CFR 300, Appendix A, Section 1.1.

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is no requirement to ascribe all contamination at a location to a particular source at this time, and that it is more appropriate to properly characterize these upland sites as sources rather than consider they come from the Creek itself. Numerous sources of contamination to Newtown Creek have been identified with a high degree of certainty in fact NYSDEC has formally identified many. Clearly upland sources exist and although it would not be possible to attribute or allocate the contamination to a particular source it is suggested that the CERCLA legislation provides for joint and several liability, and multiple sources are easily accommodated.

Not pursuing this preferred approach, EPA considered the sediments the source, and calculated the hazardous waste quantity factor based on the estimated volume of contaminated sediments, contravening the HRS scoring process. Apart from being inconsistent with the scoring process, the volume measure overstates the hazardous waste quantity in the HRS scoring because it is based upon theoretical calculations of hazardous waste. DEP has performed Toxicity Characteristic Leaching Procedure (TCLP) testing on eight samples from portions of the Creek and has determined the sediment in those locations is not hazardous waste. This was not considered in the HRS scoring.

While it is recognized that contaminants are present in Newtown Creek and this contamination should be addressed, the HRS score EPA developed for Newtown Creek remains questionable.

2.2.3 HRS Calculation

The HRS was recalculated with consideration given to the site specific sensitive area factor and the hazardous waste quantity factor. Table 1 shows that using all of the other factors assigned by EPA with the exception of the site specific sensitive area factor and hazardous waste quantity factor, the HRS could be as low as 16.7, as compared with 50 in the EPA HRS Documentation. These results suggest that while Newtown Creek sediments do contain contaminants of concern, it is not demonstrated that all of the sediments of Newtown Creek represent hazardous waste.

3.0 CSO Long Term Control Planning

The EPA HRS Documentation Record states that although many businesses along Newtown Creek operate without sewer services, there are numerous permitted CSO dischargers and storm water or other industrial discharges to Newtown Creek. The EPA Documentation Record indicates that CSO events still discharge more than 2.7 billion gallons of storm water and raw sewage into the Newtown Creek each year during wet weather. The most recent NYCDEP Water Body/Watershed Long Term CSO Control plan for Newtown Creek³⁹ includes, for approximately 40 inches of annual rainfall, a CSO discharge to Newtown Creek of 1.5 billion gallons per year and another 576 million gallons per year of stormwater, totaling less than 2.1 billion gallons. Accordingly, the 2.7 billion gallons indicated in the HRS Documentation Record is overstated and would require more than the typical 40 inches per year of rainfall to occur. DEP's current CSO Program for Newtown Creek, as described in the Newtown Creek Waterbody Watershed Plan submitted to NYSDEC in July 2007 anticipates abating CSO volume by an additional 925 million gallons per year.

³⁹ NYCDEP Newtown Creek Watershed/Waterbody Plan work-in-progress, pending NYSDEC review.

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4.0 Conclusions

1. Scoring to place Newtown Creek on the NPL was driven by EPA considering the sediments underlying Newtown Creek as a release based on differences in measured contaminant concentrations in the sediments of Newtown Creek and a local reference site, the Atlantic Basin.
2. Apparent differences in sediment contaminant concentrations between Newtown Creek and the Atlantic Basin reported on the basis of sediment dry weight may be an artifact of the different organic carbon contents of the site and reference sediments.
3. Comparing sediment contaminant concentrations between the Newtown Creek site and the Atlantic Basin reference site on an organic carbon normalized basis may lead to different conclusions.
4. The entirety of the sediments of Newtown Creek do not meet the definition of a hazardous waste therefore the hazardous waste quantity factor calculated by EPA for the Newtown Creek HRS score is overstated.
5. The hazardous waste quantity factor calculation is dependent upon the selection of a divisor. It is not clear that a 2.5 divisor for source category "Other" should have been used for the Newtown Creek sediments. For example, the divisor for source category "Soil" is 2500.
6. Newtown Creek sediments were considered by EPA as an unallocated source and were also evaluated for volume and area measures. EPA's own HRS guidelines do not consider unallocated sources in estimating volume and area measurements. Therefore, the quantity and quality of material considered as hazardous waste are overstated. Ultimately, this inflates the HRS score for Newtown Creek.
7. Technically defensible HRS scores, calculated using different assumptions than EPA used for hazardous waste quantity factor and sensitive environments range between 16.7 and 50. Addition to the Superfund NPL requires a score of at least 28.5.
8. CSOs, characterized by EPA as contaminant contributors to Newtown Creek, are more accurately characterized as contaminant conveyors to which surface water quality standards do not directly apply.
9. Current CSO discharge volumes referenced in the HRS documentation appear to be overestimates.

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Table 1. Surface Water Pathway - Overland/Flood Migration Component

Surface Water Pathway Threats				
I. Drinking Water	Not Scored			
II. Human Food Chain Threat	Scored			
III. Environmental Threat	Scored			
II. Human Food Chain Threat	Existing	Adjusted Sensitive Environment	Adjusted Hazardous Waste Quantity (Divisor) & Sensitive Environment	Adjusted Hazardous Waste Quantity (TCLP) & Sensitive Environment
Likelihood of Release				
14. Observed Release:	550	550	550	550
Waste Characteristics				
15. Toxicity/Persistence/Bioaccumulation	5×10^8	5×10^8	5×10^8	5×10^8
16. Hazardous Waste Quantity	10000	10000	100	1
17. Waste Characteristics	1000	1000	320	100
Targets				
18. Food Chain Individual	45	45	45	45
19. Population				
a. Level I Concentration	0	0	0	0
b. Level II Concentration	0.03	0.03	0.03	0.03
c. Potential Human Food Chain Contamination	0.0000003	0.0000003	0.0000003	0.0000003
d. Population (a+b+c)	0.0300003	0.0300003	0.0300003	0.0300003
20. Targets (18+19d)	45.0300003	45.0300003	45.0300003	45.0300003
21. Human Food Chain Threat Score ((lines 14+17+20)/62,500)*	100	100	96.0640006	39.0200002
III. Environmental Threat				
Likelihood of Release				
22. Observed Release:	550	550	550	550
Waste Characteristics				
23. Toxicity/Persistence/Bioaccumulation	5×10^8	5×10^8	5×10^8	5×10^8
24. Hazardous Waste Quantity	10000	10000	100	1
25. Waste Characteristics	1000	1000	320	100
Targets				
26. Sensitive Environments				
a. Level I Concentration	0	0	0	0
b. Level II Concentration	100	5	5	5
c. Potential Contamination	Not Scored	Not Scored	Not Scored	Not Scored
d. Sensitive Environments (a+b+c)	100	5	5	5
27. Targets (26d)	100	5	5	5
28. Environmental Threat Score ((lines 22+25+27)/52,500)**	60	33.33333333	10.66666667	3.33333333
29. Watershed Score (lines 21 + 28)*	100	100	100	33.3533335
30. Surfacewater Overland/Flood Migration Component Score ($S_{of} = S_{wq}$)*	100	100	100	33.3533335
Final HRS Score $HRS = \sqrt{S_{wq}^2/4}$	50	50	50	16.6766667

Appendix F

F. Letter from the Mayor's Office to the City Council Regarding the Greenpoint Williamsburg Rezoning



THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

DANIEL L. DOCTOROFF
DEPUTY MAYOR FOR
ECONOMIC DEVELOPMENT AND REBUILDING

May 1, 2005

Speaker Gifford Miller
New York City Council
City Hall
New York, NY 10007

Re: Greenpoint/Williamsburg – City Council ULURP Actions

Dear Mr. Speaker:

Attached to this letter is a "Points of Agreement" reflecting recent discussions between the Administration and the City Council with respect to the consideration by the City Council of the Greenpoint/Williamsburg zoning and related ULURP actions.

As we have discussed, some of the items set forth in the Points of Agreement will require changes to the zoning resolution which may be made by the Council now, while other items may require additional follow-up action by the Administration, the City Council, the Planning Commission and other parties. Where follow-up action is needed, such follow-up is subject to review and consideration under applicable procedures, including land use and environmental review, and the receipt of applicable approvals. We are confident that we can continue to work together to achieve the goals stated in the Points of Agreement.

The cooperation and input that we have received from members of the City Council thus far has been extremely valuable. We look forward to working further with you, and the entire Council, as the project progresses.

Sincerely,

A handwritten signature in dark ink, appearing to read "Daniel L. Doctoroff".
Daniel L. Doctoroff

Appendix F

Points of Agreement

Greenpoint Williamsburg Rezoning
May 2, 2005

OPEN SPACE

1) Dupont Street Site

a) Commitment to Open Space

The City will build upon a commitment towards building open space on the "Sludge Tank Site" (Block 2494, Lot 6) made by the previous Administration by exchanging the open space planned for Lot 6 for a commitment to build significantly more open space on an adjacent city-owned waterfront site (Block 2472, Lot 32.)

Lot 6 (0.27 acres) is currently occupied by a Department of Environmental Protection (DEP) sludge storage tank, and Lot 32 (2.88 acres), located directly on the waterfront, is currently leased to the Greenpoint Lumber Exchange and partly occupied by a DEP sludge barge loading dock. DEP has previously committed to demolishing the sludge tank as part of the upgrade of the Newtown Creek Water Pollution Control Plant, and maintaining Lot 6 as open space. DEP is currently finalizing plans to relocate the sludge facilities to a location on the Newtown Creek, with completion expected by 2010.

The Administration agrees to improve upon the current commitment to provide a small amount of open space on Lot 6 by instead providing approximately 2 acres of open space on the waterfront, thereby allowing open space to extend from Newtown Barge Park all the way south to Dupont Street. At the same time, the portion of Lot 32 located south of Dupont Street, together with Lot 6, would be available for the development of affordable housing.

In order to create open space on this site, the City would pursue the following actions:

- Designation of the portion of Lot 32 along the waterfront and north of Dupont Street for improvement as an esplanade and open space, upon expiration or reacquisition of the current leasehold interest
- Demolition of the sludge tank and relocation of sludge facilities from the site, with projected completion in 2010
- A capital budget commitment of approximately \$7.5 million in FY '10 for the creation of this open space

In addition, modifications to the zoning text for the Waterfront Access Plan have been made to ensure that the public access area provided on Lot 32 will not reduce the requirements for supplemental public access on the adjacent privately owned sites.

2) 65 Commercial Street (MTA Site)

a) Relocation of MTA facilities

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Pursuant to the Metropolitan Transit Authority's (MTA) commitment to relocate bus service and emergency response unit facilities from 65 Commercial Street (see attached letter from Roco Crtnislik, MTA Director of Real Estate) conditioned upon New York City's successful identification of an alternate site, the Administration commits to the identifying an alternative location(s) for the MTA operations at 65 Commercial Street.

b) Funding Appropriate Costs Pertaining to Open Space

Upon relocation of the MTA facilities, the Administration agrees to designate the site (Block 2472, Lot 425) for improvement as an esplanade and active open space.

The Administration will include approximately \$14 million in capital budget appropriations in the FY '07 Executive Budget for City Council approval for the creation of this open space and the relocation of the current MTA facilities.

3) McCarren Park

a) Feasibility Analysis of Street Demappings

The Administration will fund the Parks Department to perform a traffic feasibility analysis in FY '06 for the potential of demapping the portions of Driggs Avenue or Lorimer Street that run through McCarren Park.

b) McCarren Pool

The Administration will pursue an interim use for the McCarren Park Pool for special events such as concerts, festivals and other types of public performances. This will create a useable space for the community from a currently restricted area of the park, as well as contribute to the reconstruction of the full facility. The Parks Department will stabilize the pool building façade, make surface repairs to the pool deck and tub and add ramps, safety rails, and lighting as necessary. The work on the building façade may also make it possible to remove the chain link security fence that currently surrounds the site.

The Parks Department will work closely with Council Members Reyna and Yassky to determine a policy for programming the above space.

The Administration will include up to \$1 million of capital budget appropriations in the FY '06 Executive Budget for City Council approval to achieve these improvements.

c) Lighting for McCarren Park Soccer Fields

The Administration will include up to \$600,000 of capital budget appropriations in the FY '06 Executive Budget for City Council approval for the construction of lighting for the McCarren Park soccer fields.

4) 34th Councilmanic District

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a) *Open Space*

The Administration agrees to commit the following city-owned sites as open space:

- Block 2462, Lot 13 (317 Broadway): Approx. 2,500 sf to be provided as passive open space as an addition to Rodney Park
- Block 2443, Lot 41 (99 S. 5th Street): Approx. 1,170 sf to be provided as passive open space in conjunction with affordable housing development on City-owned assemblage

The Administration will include capital outlay appropriations in the FY '07 Executive Budget for City Council Approval to develop each of the above sites as passive open space.

5) *Waterfront Esplanade*

a) *Transfer of Ownership to City*

The Greenpoint-Williamsburg Waterfront Access Plan (WAP) provides for the construction of a waterfront esplanade and related open spaces in conjunction with development of waterfront parcels. Under the regulations, the developer/owner constructs the waterfront esplanade and open space in conformity with design regulations set forth in the Zoning Resolution, and enters into a Maintenance and Operating Agreement with the Parks Department providing for ongoing maintenance and capital repair of the spaces at owner expense. Fulfillment of these requirements is a condition of receipt of Certificates of Occupancy for the adjoining development.

The WAP provides a unique opportunity for the creation of a more than two-mile continuous esplanade along the Greenpoint-Williamsburg waterfront which can serve as a valuable public open space amenity for the community, as well as enhance the value of waterfront development.

The Administration believes that City ownership and management of the waterfront esplanade and supplemental open space would be in the long-term interests of the community and of benefit to property owners. This can be accomplished through the voluntary transfer of the waterfront area to the City, under specified conditions.

The Greenpoint-Williamsburg rezoning has been modified to allow for a transfer option to facilitate these objectives. Under the transfer mechanism made possible under this modification, Owners could elect to transfer the waterfront esplanade and supplemental open space to the City following construction completion and prior to the issuance of Certificates of Occupancy for the development. An Owner who transfers would be responsible for funding of ongoing ordinary maintenance and would establish a capital reserve fund for future capital repair, but these obligations would be fixed (except to account for inflation) and would not increase in relation to actual City costs. The Owner would also be relieved of liability associated with non-commercial operation of the waterfront spaces. The mechanism, which the City would encourage all developments to utilize, would facilitate City management and control of a continuous waterfront esplanade, while relying on Owners for construction.

Program features would be as follows:

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- Eligibility for transfer would require Owner agreement with respect to, among other things: DPR review and approval of design and construction specifications for the waterfront public access area proposed for transfer; compliance with DPR standards relating to use of materials; and monitoring of construction by DPR resident engineer at Owner expense. Transfer of property for a phase of the waterfront esplanade would be at the City's discretion. Where transfer is proposed for a phase of required public access in connection with a phased implementation plan approved pursuant to the zoning, acceptance of transfer would require consideration of whether City management and operation of an individual phase is in the interests of the City and the City could require agreement to transfer future phases as a condition of its acceptance of transfer of the initial phase.
- Owner would commit to fund ongoing operating maintenance through annual payments or creation of an interest-bearing account and to establish a capital reserve fund for future capital repair costs. These obligations would be fixed and not subject to increase (except to account for inflation).
- Owner would transfer deed to the City upon completion of the waterfront esplanade and supplemental open space, upon a determination by DPR that construction is consistent with the design and construction specifications. Transfer would be a condition to and must occur prior to issuance of Certificates of Occupancy.
- Upon transfer, the City would be solely responsible for performance of operating maintenance, repair and capital reconstruction; the City would also assume liability relative to non-commercial use of the spaces, with exceptions relating to negligence of Owner.
- Pursuant to a Zoning Lot Development Agreement, the Owner would retain all rights to use transferred property for purposes of bulk and parking computations for the zoning lot.
- Owner may also reserve rights to use the transferred property for open air café or similar uses allowed on the Waterfront Esplanade under the zoning, subject to appropriate City oversight and provisions regarding liability.
- Alternatively, the City could negotiate with individual developers to have them make a substantial up-front payment that would allow DPR to design and construct the esplanade on behalf of the owner. Under such a scenario, the developer would first have to provide an accurate assessment of the site conditions so that the City could determine a fair estimate of the cost of the work. If an amount could be agreed upon between the developer and the City, the land would be transferred to the City prior to construction and the developer would be relieved of the obligation to complete the esplanade prior to receiving TCO's. DPR would design and construct the esplanade through its normal capital development process. All other features of program described above would apply, including the owner's responsibility to fund ongoing ordinary maintenance and establish a capital reserve fund for future capital repairs.

The Administration commits to implement this Program consistent with the features described above, subject to such changes as are needed to advance the goal of achieving a continuous waterfront esplanade under City management and control.

b) Hours of Access

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The Administration commits to pursue a follow-up action to amend the zoning text to require broader evening hours of access for public access areas required under the Greenpoint-Williamsburg WAP.

c) Continuous Waterfront Access

Recognizing that the esplanade will be developed in segments, the Administration will pursue the achievement of a continuous public access route along the waterfront, both through mechanisms to achieve the near-term development of the esplanade and the identification of on-street links where public access has not yet been developed.

The Administration will provide capital funds for appropriate signage and bicycle lanes along developed sections of the esplanade.

INDUSTRIAL PRESERVATION

1) Rezoning Study of Bushwick Inlet Area

As a follow-up, the Department of City Planning will conduct a study of the industrial area east of the Bushwick Inlet, to be completed by February 2006, with the goal of identifying potential zoning changes, such as increasing permitted density for manufacturing uses, that would further help existing businesses to remain and expand in this area and capitalize on opportunities for the creation of new industrial space. An application for zoning changes recommended by this study will be sponsored jointly by Council Members Yassky and Reyna and the Department of City Planning.

2) Industrial Business Zones

The Administration commits to designating the Bushwick Inlet industrial area as part of an Industrial Business Zone (IBZ). Businesses moving to this and other IBZs (such as the North Brooklyn Industrial Business Zone) would be eligible for all benefits proposed in the IBZs, including a tax credit of one thousand dollars per employee to offset relocation costs (pending State Legislative approval). These businesses will also be able to avail themselves of other incentives proposed in the Administration's Industrial Policy, such as an enhanced Commercial Expansion Program which will specifically target manufacturing and industrial firms who rent their space.

The Administration commits that it will not pursue or support rezoning and variance applications to allow residential use in the proposed North Brooklyn IBZ, which will include the Bushwick Inlet industrial area as well as the area of the East Williamsburg Industrial Park. The Administration, through the Mayor's Office of Industrial and Manufacturing Businesses, will red flag manufacturing and industrial properties within the IBZs in the City's Building Information System, actively monitor all BSA variance applications for residential uses in these areas, and communicate the City's industrial land use priorities to the BSA regarding such variances, any documented harassment of industrial businesses, and the potential impacts upon present industrial use and character of the areas.

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As part of the IBZ program, the Office of Industrial and Manufacturing Businesses will market the IBZs to new, expanding or relocating businesses.

The City will dedicate DOB personnel to work with the IBZs to inhibit potential illegal conversions and conduct enforcement in the North Brooklyn IBZ including the Bushwick Inlet area.

The City will designate an industrial ombudsman to work with industrial businesses in the mixed-use districts to facilitate access to programs and address any operational issues.

The Mayor's industrial policy states that the City will conduct area planning studies to identify issues to strengthen industrial areas through regulatory changes and infrastructure improvements. The City will commit to making the North Brooklyn IBZ one of the first areas it studies.

The Administration will create a \$2 million fund under the management of the Office of Industrial and Manufacturing Businesses to preserve existing manufacturing businesses within the North Brooklyn IBZ. The Mayor's Office will work closely with Council Members Reyna and Yassky to determine the programming of this fund.

Over the next five years the Administration is contributing \$67.7 million to improve infrastructure to support existing and create new industrial space in the Brooklyn Navy Yard. The Brooklyn Navy Yard Development Corporation, City Council, Community Board 1, and the Mayor's Office of Industrial and Manufacturing Businesses will make best efforts to identify and relocate industrial companies within the rezoning area that are in need of new space.

COMMUNITY DISTRICT 1 NEEDS ASSESSMENT

1) Reporting

The Administration agrees to monitor the amount of development in the rezoning area on an annual basis. After the number of new housing units built in the rezoning area exceeds 2,200 (25% of projected development), the Administration agrees to submit to the Council Members for the area by letter an annual report updating needs analysis and planned mitigations, where applicable, from relevant agencies for schools, day care, hospitals, fire protection, police service, and bus and subway service.

2) Day Care

(see attached letter)

COMMUNITY ADVISORY BOARD

The precise form of the Greenpoint-Williamsburg Community Advisory Board has not yet been determined. The purpose of the Community Advisory Board will be to monitor adherence to these

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points of agreement, including, but not limited to, the development of affordable housing units, the development of open space, the implementation of industrial preservation strategies and the periodic review of social infrastructure needs and mitigations in the Greenpoint-Williamsburg Community.

The Administration agrees that any Community Advisory Board will include a representative of Community Board 1, local elected officials, the Department of Housing Preservation and Development, the Department of Parks & Recreation, the Department of Small Business Services, the Department of City Planning, and the Economic Development Corporation, and at least two representatives from the affected communities jointly selected by the Council and the Administration.

AFFORDABLE HOUSING

1) Total Number of Units

The Administration agrees to significantly increase the number of affordable units to be built in Greenpoint Williamsburg through a variety of mechanisms including inclusionary zoning, financial and tax incentives, and the commitment of public sites. The following table summarizes the expected number of affordable units that will be generated:

	# OF AFFORDABLE UNITS
CPC proposal	2,300 (23% of total)
Revised Administration proposal	
Waterfront	1,563
Upland	640
Public & Partner sites	1,345
Total	3,548 (33% of total)

2) Affordable Housing Production Mechanisms

a) Inclusionary Housing

The Administration will increase the incentive to build affordable housing through inclusionary zoning by deepening the density bonus.

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- **Waterfront:** In exchange for an increased density bonus (3.7 FAR to 4.7 FAR or 27%) on the Waterfront, the Administration agrees to increase the affordability requirements to 20% or 25% of total square footage and agrees to tier the affordability requirement to serve low and moderate income families, as detailed in the modified zoning text.

For developments not utilizing the inclusionary housing bonus, the Administration agrees to reduce permitted tower heights in R8 districts by two stories, to 230 feet and 330 feet.

In order to provide increased flexibility for on-site affordable housing, the Administration agrees to increase permitted heights to which buildings can rise without limitation on floorplate size to 100 feet for buildings containing at least 20 percent affordable housing.

- **Upland:** In the Upland the Administration agrees to a 33% density bonus (2.7 FAR to 3.6 FAR in R6A districts and 3.45 to 4.6 in R7A districts) requiring 20% of the square footage to serve lower income families.

These percentages will be the standard for the onsite, offsite, and preservation options for generating an inclusionary bonus.

The Administration and the City Council agree to a follow up corrective action to ensure a uniform application of the reduction of the base FAR to 2.7 with respect to mixed residential community facility buildings in the R6A districts.

Shortly after adoption, the Department of City Planning will commence contextual zoning studies of areas surrounding the rezoning area that are predominantly low-rise and currently zoned R6, with the goal of establishing appropriate height limits and an Inclusionary Housing bonus for R6A and higher districts in these areas. Necessary ULURP actions would be taken to implement these zoning changes.

b) Tax Incentives

The Administration and the Council agree to support State action to limit as-of-right 421-a benefits, on certain waterfront parcels only, in order to make the construction of affordable housing more likely. Further, the Administration agrees to change its rules governing the 421-a program to allow inclusionary housing units developed off-site to generate 421a negotiable certificates and used them on the compensated waterfront property. HPD will be required to limit this to 200 units thus insuring that 90 percent of all inclusionary housing is developed on-site.

Finally, the Council and the Administration agree that at the 3.7 base FAR any development done as of right cannot participate in the 421a program by purchasing negotiable certificates citywide.

A proposed bill is attached.

The Administration and Council further agree that if the State does not pass its proposed bill by June 23, 2005, Council will act to amend the administrative code of the City of New York to limit the as-of-right 421a benefits.

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c) Sale of Air Rights from MTA Commercial Street Site

The Administration and Council agree to allow the sale of air rights from the MTA Commercial Street site to an adjacent owner. The sale will require a follow up ULURP for the disposition of those development rights. This disposition will require the purchaser to create 200 units of affordable housing as part of the disposition. The revenue from the sale, projected to be up to \$12 million will be used in two ways:

- **Waterfront Affordable Housing and Infrastructure Fund**

The Administration agrees to create a Greenpoint Williamsburg Affordable Housing and Infrastructure Fund of up to \$10 million – to be managed by HPD – using the proceeds received from the sale of air rights from the MTA site located on Commercial Street in Greenpoint. Proceeds from this fund will only be available to development parcels that make use of the waterfront inclusionary housing program referenced in part a of this section and that participate in the esplanade transfer program detailed in Point 5 of the Open Space section of this agreement. Funds will be used to partially offset site-specific infrastructure costs that comply with the requirements of the waterfront zoning text.

- **Greenpoint Williamsburg Tenant Legal Fund**

The Administration agrees to create a Tenant Legal Fund of \$2 million – to be managed by HPD – using the proceeds received from the sale of air rights of the MTA site on Commercial Street in Greenpoint. The Fund will primarily serve to protect existing tenants from displacement and harassment.

d) Commitment on Public and Partner Sites

The Administration commits to developing affordable housing using available public sites and to work with the existing owners to develop affordable housing on the partners sites listed below. The Administration anticipates that these sites will generate 1,345 affordable units. These units will target the following income groups: 20% between 20-30% of AMI, 40% between 30-60% of AMI, 20% between 60-80% of AMI and 20% between 80-125% of AMI.

A detail breakdown of each public or partner site is attached to this memorandum.

3) Anti-Harassment Provisions

The Administration agrees to the anti-harassment provisions provided separately, as part of a follow-up corrective action.

4) Domino Sugar Property

The Administration agrees to work expeditiously to commence public review of an application for the residential rezoning of this property, including completion of appropriate environmental review, located at 264 to 366, and 329 Kent Avenue. The Administration and Council will work closely with the property owner's principal, CPC Resources, Inc., to ensure that development facilitated by the application includes a significant affordable housing component. In addition,

Appendix F

the Administration agrees to support the inclusion of this site in the above referenced bill limiting as-of-right 421a benefits.

Appendix F

ATTACHMENTS

**Letter from Roco Krsulic, Director of Real Estate, MTA
Public and Partner Sites Chart**

Appendix F

05/28/05 PM 05:29 FAX 212 878 7000

347 Madison Avenue
New York, NY 10017-3739
212 878-7000 Tel



Metropolitan Transportation Authority

State of New York

April 28, 2005

Daniel L. Doctoroff
Deputy Mayor for Economic Development and Rebuilding
City Hall
New York, NY 10007

Dear Deputy Mayor Doctoroff:

Pursuant to your inquiry about the availability of the Crosstown Depot property on Commercial Street in Greenpoint, I wanted to confirm that the Metropolitan Transportation Authority - New York City Transit would be willing to transfer the site to the City of New York for use as publicly accessible open space within the context of the Greenpoint/Williamsburg rezoning plan.

The transfer of the site would be dependent upon the City theretofore having identified acquired, and fitted out a suitable alternative site for the Emergency Response Unit currently operating on the site and the replacement or relocation of all the Unit's facilities to the new locations. In addition, please note that the Emergency Response Unit located on the site is extremely location-sensitive and would need to be relocated within close proximity of the current location. The City would also need to have provided a replacement site for New York City Transit's Department of Buses. The Buses' site must be of equivalent or greater value than the existing Crosstown Depot. The replacement site for the Department of Buses does not need to be in the immediate neighborhood; we have begun discussions on that issue with your staff.

The MTA shares the City's enthusiasm about the Greenpoint/Williamsburg waterfront and looks forward to working with you and your staff to bring this excellent plan to reality.

Sincerely,

A handwritten signature in black ink, appearing to read "Roce Krsulic".

Roce Krsulic
Director, Real Estate

cc: Katherine N. Lapp
Linda Kleinbaum
Michelle Goldstein

S:\RDCO\Doctoroff_Ltr_Greenpoint.doc

The agencies of the MTA: Peter S. Kalikow, Chairman
MTA New York City Transit MTA Long Island Rail Road MTA Long Island Bus MTA Metro-North Railroad MTA Bridges and Tunnels

Appendix F



THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

KAREN E. MEALA
DIRECTOR
CITY LEGISLATIVE AFFAIRS

May 2, 2005

Hon. Diana Reyna
New York City Council Member, 34th District
444 South 5th St.
Brooklyn, NY 11211

Dear Council Member Reyna:

I am writing to respond to your request that as part of the Williamsburg Greenpoint rezoning agreement, the City fund child day care slots at the Williamsburg Day Care Center. The Administration will make available to the Council, at budget adoption, \$900,000 to fund 150 slots at this facility. The exact mechanism for allocating these funds to this center and the identification of a provider to administer these funds will be determined over the coming weeks. We are pleased to be able to offer this resource to the Williamsburg community.

Sincerely,


Karen E. Meala

Appendix F

Attachment 3: Public and Partner Sites Chart

Public Sites	Total Units	# of Affordable Units
LPC warehouse	37	37
Bedford Ave/ S 4th	22	22
Greenpoint Hospital	265	265
37-39 Maujer Street	18	18
33 Ten Eyck Street	18	18
59 Java Street	3	1
239 Grand Street	3	1
303 Grand Street	5	5
280 Grand Street	3	1
37 Ten Eyck Street	6	6
112 Seigel Street	8	6
Dupont Street	550	431
43 Herbert Street	14	14
N. 4th Street	80	40
Cooper Park	130	130
Brooklyn Diocese Sites (4)	150	150
MTA Commereial Street	400	200
Total	1,710	1,345

Appendix G

G. Calculations of Superfund Timelines for Sites on the NPL in New York State

1. Data Set

- A total of 112 sites have been proposed to the NPL in NY State.¹
 - 3 sites have been proposed but not finalized:
 - Newtown Creek in Brooklyn and Queens, NY
 - Gowanus Canal in Brooklyn, NY
 - Hudson Technologies in Hillburn, NY
 - Proposed but not finalized sites were excluded from the following analysis.
 - The remaining 109 sites, which have been finalized to the NPL, were included in the following analysis. All data were obtained from EPA's CERCLIS database.²
- Completed and Uncompleted NPL sites in NYS
 - Completed sites: 24 sites (22 percent) have advanced from proposal through deletion from the NPL and for the purposes of this analysis are considered "completed" sites and represent a relatively short Superfund timeline in comparison to that likely for a complex urban waterway such as Newtown Creek.
 - Uncompleted sites: 85 sites (78 percent) have been finalized to the NPL but have not been deleted from the NPL and are within various milestone stages of the Superfund process. For the purposes of this analysis these sites are considered "uncompleted" sites and the timeline represents a longer, more representative Superfund expectation³ with respect to an NPL listing of Newtown Creek.

2. Completed Sites Timeline – Time from Proposal to Deletion: 14.6 Years

Table a:

Timeline for Completed Sites: 24 Sites Deleted from NPL				
Milestone	Average Time from Proposal to: (yrs)	# sites with dates	% of total deleted sites	% of total NYS NPL sites
Final NPL Listing	1.5	24	100%	22%
Record of Decision (ROD)	7.5	24	100%	22%
Remedial Action End	11.2	24	100%	22%
NPL Deletion	14.6	24	100%	22%

- Includes the 24 completed NPL sites in NYS (22 percent).

¹ US EPA, National Priorities List, Search Superfund Site Information, <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm> (Dec 18, 2009).

² US EPA, National Priorities List, Advanced Query Form, <http://www.epa.gov/superfund/sites/query/advquery.htm> (April 14, 2009).

³ See Sapien, *Superfund Progress Drops Off Under Bush*, The Center for Pub. Integrity (Apr. 26, 2007), available at <http://projects.publicintegrity.org/superfund/report.aspx?aid=853>.

Appendix G

- All sites have advanced through the Superfund process from proposal to deletion from the NPL.
- Averages are calculated from milestone dates reported by EPA.⁴

3. Uncompleted Sites Timeline - Time from Proposal to Deletion: 18.5 Years

Table b:

Timeline for Uncompleted Sites: 85 Sites finalized to, but not yet deleted from, the NPL								
Milestone	Average Time from Proposal to (yrs)	Weighted Average Time from Proposal (yrs)	# sites with dates	% of total uncompleted sites	Average time for sites with dates (yrs)	# sites with no dates	% of total uncompleted sites	Average time for sites without dates (yrs)
1. Final NPL Listing	1.3		85	100%	1.3	0	0%	-
2. ROD		12.5	57	67%	9.9	28	33%	17.8
3. Remedial Action End		15.9	54	64%	14.7	31	36%	18.1
4. NPL Deletion		18.5	54	64%	18.1	31	36%	19.3

- In order to calculate an average for the number of years these uncompleted sites spend in the Superfund process, a very conservative approach was taken by assigning July 8, 2009 to any uncompleted milestones.
- Includes 85 uncompleted NPL sites in NYS (78 percent)
 - All sites have been finalized to the NPL and are within various milestone stages of the Superfund process.
- Calculations for each milestone:
 - Milestone 1: Proposal to NPL though final NPL listing.
 - Average Time: 1.3 years
 - Average for all 85 sites calculated from milestone dates reported by EPA.⁵
 - Milestone 2: Proposal to NPL to record of decision (ROD), when the final remedy is selected.
 - Average calculated from milestone dates reported by EPA for 57 sites (67 percent of data set) that have a ROD.
 - Average time for these 57 sites is 9.9 years.

⁴ US EPA, National Priorities List, Advanced Query Form, <http://www.epa.gov/superfund/sites/query/advquery.htm> (April 14, 2009).

⁵ US EPA, National Priorities List, Advanced Query Form, <http://www.epa.gov/superfund/sites/query/advquery.htm> (April 14, 2009).

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- Estimate calculated for 28 sites (33 percent of data set) that have not yet reached this milestone.
 - These 28 sites have not reached the ROD.
 - Average time from proposal to 2009 for these 28 sites is 17.8 years
- Weighted average: 12.5 years
 - $(9.9 \text{ years})(67\%) + (17.8 \text{ years})(33\%) = 12.5 \text{ years}$
- Milestone 3: Proposal to NPL to remedial action end (construction complete).
 - Average calculated from milestone dates reported by EPA for 54 sites (64 percent of data set) that have reached the remedial action end.
 - Average time for these sites is 14.7 years.
 - Estimate calculated for 31 sites (36 percent of data set) that have not yet reached this milestone.
 - These 31 sites have not reached the remedial action end.
 - Average time from proposal to 2009 for these 31 sites is 18.1 years.
 - Weighted average: 15.9 years
 - $(14.7 \text{ years})(64\%) + (18.1 \text{ years})(36\%) = 15.9 \text{ years}$
- Milestone 4: Proposal to NPL to deletion from NPL
 - By definition, none of the uncompleted sites have reached the NPL deletion milestone.
 - Estimate calculated for 54 sites (64 percent of data set) that have reached the remedial action end but have not yet been deleted from NPL.
 - Average time from proposal to the NPL to 2009 for these sites is 18.1 years.
 - Estimate calculated for 31 sites (36 percent of data set) that have not reached the remedial action end.
 - Weighted average for number of years from proposal to remedial action end (results from Milestone 3 calculation) is 15.9 years.
 - Average time from remedial action end to deletion from NPL for completed site dataset is 3.4 years (from Table a: 14.6-11.2 years).
 - Estimate calculated for time from proposal to deletion for these 31 sites: 19.3 years (15.9 + 3.4 years)
 - Weighted average: 18.5 years
 - Weighted average calculation:
 $(18.1 \text{ years})(64\%) + (19.3 \text{ years})(36\%) = 18.5 \text{ years}$

Appendix H

H. Letter to EPA and NYS DEC Regarding NYC DEP Capital Work and Water Quality Improvement Projects



New York City Department of
Environmental Protection
www.nyc.gov/dep

59-17 Junction Boulevard
Flushing, NY 11373

Steven W. Lawitts
Acting Commissioner

Robin M. Levine
General Counsel

Bureau of Legal Affairs

Tel. (718) 595-6586
Fax (718) 595-6543
rlevine@dep.nyc.gov

December 14, 2009

Mr. Walter E. Mugdan
Region II Director
U.S. Environmental Protection Agency
290 Broadway
New York, New York 10007

Mr. Stuart Gruskin
Executive Deputy Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233

Re: Assurances needed from the U.S. Environmental Protection Agency and the New York State Department of Environmental Conservation prior to awarding contracts for New York City Department of Environmental Protection's projects in Newtown Creek that include New York State mandates and impact City initiatives

Dear Messrs. Mugdan and Gruskin:

This letter is a follow-up to our recent meeting with the U.S. Environmental Protection Agency ("EPA") concerning the proposed addition of Newtown Creek on the National Priorities List ("NPL"). The City remains committed to working cooperatively on this very important matter. It is the City's understanding that the proposed listing is limited to Newtown Creek; therefore the discussion that follows will not address projects, including planned capital work, in the East River. Of immediate concern is our ability to proceed with critical capital work required by a New York State Department of Environmental Conservation ("DEC") Consent Order and/or committed to in the Mayor's Greenpoint-Williamsburg Land Use and Waterfront Plan. In order for the City to proceed according to schedule, we are seeking concurrence from DEC and EPA ("Agencies") in moving forward with these projects and are respectfully requesting that the EPA agrees to set aside any Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") liability that could arise from the work. If the Agencies agree to this it would help to insure that the City's expenditures for these projects are not compromised in the event that the work is stopped, modified, or otherwise affected in connection with the

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proposed addition of Newtown Creek ("Creek") to the NPL list. These projects and concerns are discussed in greater detail below.

PLANNED CITY WORK

Newtown Creek is immediately adjacent to two large-scale land use projects, one in Brooklyn and the other in Queens. The Greenpoint-Williamsburg Rezoning, completed in 2005, is immediately adjacent to the Creek to the south. The rezoning allows for the redevelopment of an underutilized industrial waterfront with housing and open space, uses the City's Inclusionary Housing Program to incentivize the creation of affordable housing for low and moderate-income households, and includes waterfront access requirements to ensure the community and residents have additional open space and waterfront access. As part of the Greenpoint-Williamsburg Rezoning, Mayor Bloomberg committed to demolishing the New York City Department of Environmental Protection's ("DEP") East River Sludge-Storage Tank and Dock thus making these areas available for housing and open space. As a replacement, the City will construct a new permanent dock in the Creek accessible by specially designed sludge vessels. In 2008, the City rezoned Hunter's Point South, along the northern mouth of the Creek. The New York City Department of Housing Preservation and Development is currently working with New York City's Economic Development Corporation to create a large-scale, mixed-use development plan that includes affordable housing for middle income residents, retail space, community facility space, more than 11 acres of open space, and related infrastructure. Generally, the projects related to these initiatives will proceed over a multi-year horizon and therefore, will require an ongoing review and approval of waterfront permits by EPA and DEC as applicable.

DEP WORK PLANNED IN AND AROUND NEWTOWN CREEK

I. Planned Dock Work

The Planned Dock Work has three principal components: 1) construction of an interim loading dock on the Whale Creek and demolition of the existing East River dock; 2) demolition of the existing municipal solid waste Marine Transfer Station and construction of a permanent loading dock on Newtown Creek; and 3) navigational dredging to ensure that sludge vessels can access the two new docks.

To meet its commitment to vacate the East River sludge loading facility, DEP must construct a new interim sludge loading dock in Whale Creek, adjacent to the Department of Sanitation of New York's (DSNY) Greenpoint Marine Transfer Station (MTS). The interim dock will be used until the MTS, inclusive of the MTS facility, access ramp, and storage garage beneath the access ramp, is demolished and a new permanent sludge loading dock can be constructed in its place on the Creek. DEP intends to use the sludge loading dock on the Creek for permanent sludge management and loading operations adjacent to the Newtown Creek Water Pollution Control Plant ("WPCP"). Upon completion of the new dock on the Creek, operations would be

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transferred to the Creek from the sludge loading dock on Whale Creek. The sludge loading dock on Whale Creek would then be used only as needed in the event that the sludge loading dock on the Creek is unavailable, or for vessel storage. The Newtown Creek WPCP Sludge Loading Facility EAS (CEQR No. 06DEP023K), issued in March 2007, anticipated the construction of a new sludge loading dock, bulkheading, and installation of dolphins to support the interim sludge loading facility in Whale Creek and permanent sludge loading facility in the Creek. The construction of the new interim dock and demolition of the existing dock is expected to commence by April 2011 and be completed by June 2013. The projected cost of this element is \$66 million.

DEP's proposed navigational dredging within the Newtown and Whale Creeks will consist of maintenance dredging of approximately 22,000 to 30,000 cubic yards of material (please see the attached figure that depicts the area that will be dredged on page 8). The dredging will allow 17 feet of clearance from mean low water in the Creek and 18 feet of clearance in Whale Creek. The currently authorized navigational channel in this area is 21 feet below mean low water. Based on current shoaling rates, it is anticipated that additional maintenance dredging will be necessary in approximately ten years. Dredging activities are anticipated to begin in 2012 and staging activities for the dredging will begin in 2011. DEP submitted an application for a dredging permit to the U.S. Army Corps of Engineers ("USACE") and DEC on December 2, 2009. The projected cost of this element is \$32 million.

To support this work, DEP commissioned a Sediment Sampling and Analysis Plan ("SSAP"). Samples for the SSAP were taken in March 2009. The SSAP was delivered to DEC and USACE in August 2009 and discussed in a meeting with DEC and USACE on August 12, 2009. Results from the SSAP are as follows:

- (i) Newtown Creek and Whale Creek are classified as "SD" saline surface waters. Preliminary sediment sampling and analysis (conducted in June 2009) for bioaccumulation and biotoxicity has revealed that most samples representing what is proposed for dredged material and exposed sediments below the proposed dredge material depth would be classified by New York State as CLASS C, for one of more Technical Operational Guidance Series 5.1.9 parameters.
- (ii) DEP conducted sampling of the sediment and identified results comparable to those of the EPA. When compared against 6 NYCRR Part 371 Toxicity Characteristic Leaching Procedure (TCLP) and Resource Conservation and Recovery Act (RCRA) criteria, it was determined that none of the potential sediment composites exceed the TCLP or RCRA criteria, and therefore the proposed dredged material has been characterized as "non-hazardous waste" for purposes of disposal (please see the attached table on page 9).
- (iii) The planned dredging procedure will employ environmental "clamshell" buckets, which will greatly increase dredging precision, as well as reduce

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the number of "cuts" needed to raise the dredged material. This level-cut design system lowers material loss, turbidity, and water content. Waters exposed in the dredging process will then be decanted and treated in a package treatment plant. Non-hazardous sediment will be brought to a suitable dewatering facility by barge and prepared for upland disposal. DEP's sampling analysis has confirmed that surface material exposed as a result of the dredging work would be equivalent of similar chemical characteristics of the surface material removed by the dredging.

2. Planned CSO Work

Pursuant to the DEC Combined Sewer Overflow CSO Consent Order (CSO Order),¹ DEP is required to undertake certain projects to improve water quality in the Creek. By letter dated April 30, 2009, DEP proposed modifications to the CSO Order to require the installation of permanent in-stream enhanced aeration facilities designed to improve dissolved-oxygen (DO) levels in Upper and Lower English Kills, East Branch, Maspeth Creek, and Dutch Kills. The plan also calls for environmental dredging in Maspeth Creek, Dutch Kills, East Branch, and English Kills. Finally, the plan provides for floatable control, bending weirs, and a Dutch Kills relief sewer.

The CSO Work is intended to abate the volume of CSOs released into the Creek by 325 MG/year, reduce the floatable debris associated with CSO events, decrease pathogen concentration, and increase DO levels. The CSO Work will cost approximately \$157 million and is funded in the City's capital budget.

The City is in the process of implementing elements of the CSO Work. DEP constructed an aeration facility in Upper English Kills at a cost of \$15.7 million. The facility became operational on December 31, 2008 and has significantly improved DO levels in the Kills. DEP is continuing to monitor water quality improvements. Design work for the Lower English Kills aeration facility commenced in November 2008 and is scheduled to be completed in December 2010, with construction scheduled to commence in October 2011 and end in April 2013. The cost of this project element is estimated at \$3.3 million. Enhanced Newtown Creek aeration design work, which includes aeration facilities in the main branch of Newtown Creek, East Branch, Maspeth Creek and Dutch Kills, began in June 2009 and is scheduled to be completed in March 2013, with construction scheduled to begin in February 2016 and end in February 2018. The estimated cost of these projects elements is \$75 million.

Environmental dredging design work, anticipated to be conducted in each of the tributaries discussed above, is scheduled to begin by August 2011 and be completed by December 2015, with work expected to begin by April 2017 and end by April 2019. DEP currently estimates that upwards of 170,000 cubic yards of material will be dredged and will possibly be backfilled; however, DEC will be making this final determination. The estimated cost of this project element is \$70 million.

¹ Case # CO2-20000107-8

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RISK OF CERCLA LIABILITY ARISING FROM DEP'S PLANNED WORK

The City is concerned that the Planned CSO Work and the Planned Dock Work (collectively "Planned Work") could give rise to claims of CERCLA liability against the City and its contractors. As we have discussed, courts have construed CERCLA liability liberally to achieve the statute's environmental remediation goals. Under the statute, the re-release or disturbance of hazardous materials that were previously produced by another party could be considered grounds for liability. The City is concerned that DEP's Planned Work could cause the movement, dispersal or re-release of contaminants within or from Newtown Creek and potentially give rise to a claim for CERCLA liability. The City seeks confirmation that, in the event of a Superfund listing, EPA will not seek to attribute CERCLA liability to either the City or its contractors in conjunction with the above-referenced aeration work, maintenance dredging, or sludge dock work.

FISCAL CONCERNS

In the event that Newtown Creek is placed on the NPL, the City is also concerned that the Planned Work could be found to be inconsistent with a remediation plan or any interim remedial measures that may eventually be mandated by EPA. This, in turn, could require that the work be halted or reversed. For example, if the Creek is placed on the NPL, it could prove difficult to dispose of the dredged material and the navigational dredging project might need to be stopped in midstream. It is also possible that if the dredging were completed prior to an NPL listing, the listing would require the Creek to be further dredged, raising the question of whether the Creek would be open to navigation during the dredging process.² This would make it difficult for DEP's sludge vessels to access the new sludge dock. Another concern is that dredging of the tributaries with the new aeration facilities could require removal of those new facilities at significant cost to the City. In addition, the anticipated remediation pursuant to NPL listing could result in adverse impacts on aquatic life, which is expected to rebound when the DO levels are increased as a result of the aeration facilities. These impacts could negate the improvements that would be realized in the City's CSO abatement plan. Thus, a listing may well delay or reverse the planned improvements and result in additional costs and undesirable impacts to the City.

In addition, in order to provide ongoing sludge-removal support to the Newtown Creek WPCP, DEP has commissioned three new sludge vessels for the Newtown Creek WPCP, a total investment of \$84,226,780, which will be funded by the American Recovery and Reinvestment Act. The contract for these new vessels has been awarded and we expect to register the contract before the end of the year. Any delay in the dredging, dock construction, and/or use of these vessels could potentially waste significant City and Federal resources.

² Given the importance of the Creek to adjacent industrial business, maintaining the navigability of Newtown Creek during any remedial activities is important even aside from DEP's need to access the WPCP.

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Assurances Necessary to Proceed with the Planned Work and City Initiatives

To address the liability and resource issues discussed above, before beginning the Planned Work, the City seeks written assurances from EPA and DEC, with regards to the following:

- (i) Should Newtown Creek be added to the NPL, the Planned Work will not be stopped, stalled, or modified once designs are approved or construction has commenced. Further, the Agencies will conduct timely reviews and approvals of design drawings and contract specifications that will be necessary to complete Planned Work;
- (ii) That the Planned Work does not appear to be a source of significant contamination for the proposed NPL site, nor will it constitute a violation of any of the terms, conditions and prohibitions set forth in the laws and regulations applicable to the site;
- (iii) Prior to DEC's issuance of the DEC/USACE Joint Permit for the dredging described in the Planned CSO Work and the Planned Dock Work, DEC will work with EPA and other relevant authorities to issue a final written determination(s) to DEP that the work authorized under the Joint Permit is consistent with EPA's remediation plan for Newtown Creek, to the extent allowed by Federal law;
- (iv) In the event that Newtown Creek is listed on the NPL and the City is ordered by either DEC, EPA, or a court to cease or modify the Planned CSO work, the City will not be held in default of the CSO Order or assessed any penalties under either the provisions of the CSO Order or the Environmental Conservation Law, as long as the City establishes that any non-compliance is attributable to a circumstance related to the NPL listing that has made compliance with the requirements of the CSO Order entirely beyond the City's control. In order to be entitled to this relief, the City must establish that it has made all good faith efforts to comply with the CSO Order, that it has made best efforts to recoup any lost time, and the City must provide DEC with the proper notice of the event pursuant to the requirements of Part VI of the CSO Order. If the work being undertaken under that Order is halted under the conditions described in paragraph (iv) above, then the City is assured that it will have resolved its liability to the State for the purposes of the contribution protection provided by CERCLA Section 113(1)(2) for work already undertaken as authorized by the CSO Order. To the extent authorized under 42 U.S.C. Section 9613(f)(3)(B), by entering into the CSO Order for some or all of the response action, the City is assured that it is entitled to seek contribution under CERCLA from any person except those who are entitled to contribution protection under 42 U.S.C. Section 9613(f)(2);

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- (v) That the City will be able to continue its maintenance dredging of other sediment mounds in close vicinity to the project area that are not currently part of the Newtown Creek dredging project; and
- (vi) That the same types of commercial and/or industrial vessels that currently use Newtown Creek and its tributaries for shipping, transport, and other purposes will be able to continue doing so during the Planned Work.

The City shares the Agencies' interest in addressing historical contamination in the Creek and maximizing its future use. The Planned Work represents important steps forward in the restoration of the Creek and the fulfillment of important community commitments and objects of the Bloomberg Administration. The assurances requested in this letter will allow the City to proceed with these important initiatives. We would also like to thank you and your staffs for the time and consideration dedicated to this matter.

Sincerely,

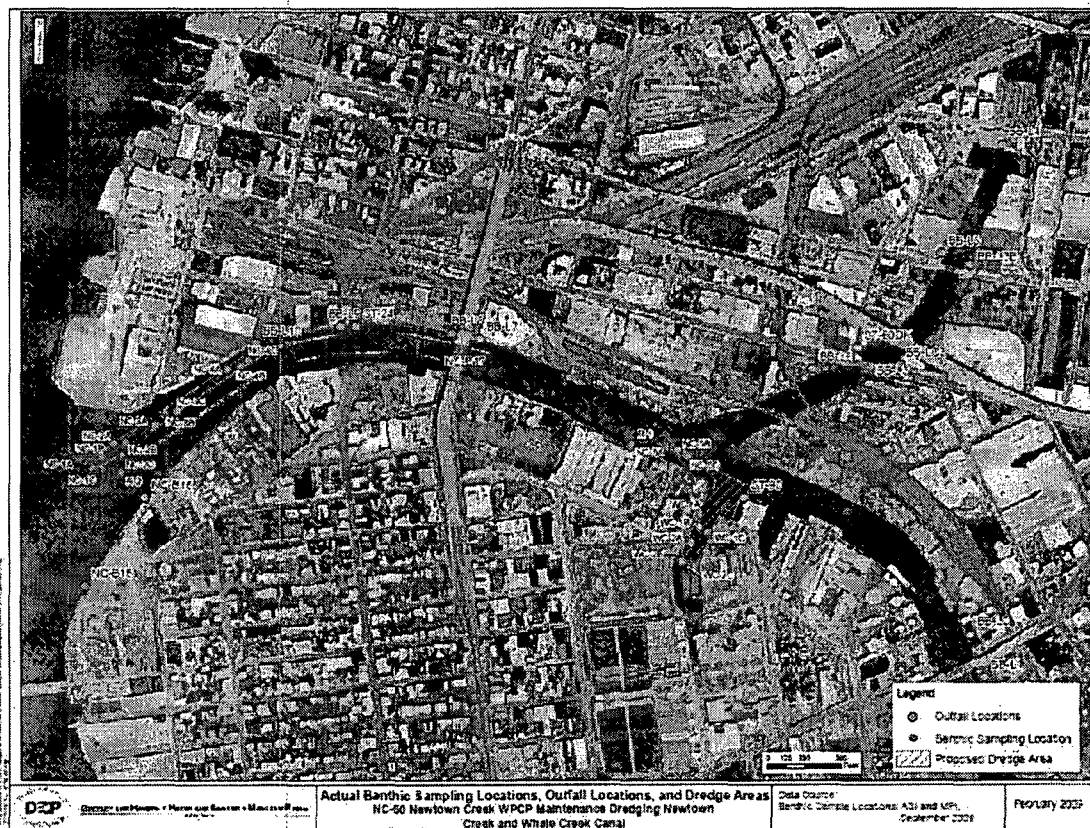


Robin Levine

cc: Cas Holloway
Johanna Greenbaum

Enclosed
Attachments

Appendix H



Appendix H

Table 5-5:
Summary of Criteria Exceeded from Sediment Samples: TCLP

Sample Station	NYSDEC Part 371 TCLP Criteria Exceeded					
	RCRA	Metals	VOCs	SVOCs	Pesticides	Herbicides
NC-1U	No	No	No	No	No	No
NC-2U	No	No	No	No	No	No
NC-3U	No	No	No	No	No	No
NC-4U	No	No	No	No	No	No
WC-1UA	No	No	No	No	No	No
WC-1UB	No	No	No	No	No	No
WC-2U	No	No	No	No	No	No
WC-3	No	No	No	No	No	No

Notes:

*Part 371 does not include a specific limit for cyanide or sulfide reactivity. This number would be reported to identified landfills to determine if sediments meet that criteria.